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No. 01-

IN THE

Supreme Court of the United States

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, WALTER E. RYAN JR., THEODORE CHABRAJA, ANITA B. HULL, ROBERT RIFKIN, and PATRICK A. STEFFES,

Petitioners,

v.

SBC COMMUNICATIONS INC., and AMERITECH CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, consumers challenge as anticompetitive on antitrust grounds the merger of two "baby Bells" considered by the Federal Communication Commission ("FCC") as each other's "most significant market participants." In light of the recurring issues and public importance of telephone industry reconsolidation and its antitrust effects after deregulation of local telephone service spurred on by the 1996 Telecommunications Act, the question presented is:

Whether, in light of the 1996 Telecommunications Act's deregulation of local telephone service, the Clayton Act, 15 U.S.C. § 18, enables consumers to challenge mergers of deregulated competitive baby Bells over the assertion that the 1914 "common carrier line extension proviso" (intended to cover line extensions of common carriers such as trucks, railroads and other regulated entities) exempts telecommunication mergers, as well, from any antitrust scrutiny?

PARTIES TO THE PROCEEDING

The following are the parties to the proceeding:

The Petitioners: South Austin Coalition Community Council ("SACCC"), Walter E. Ryan Jr., Theodore Chabraja, Anita B. Hull, Robert Rifkin and Patrick A. Steffes.

The Respondents: SBC Communications Inc. ("SBC"), a Texas corporation headquartered in San Antonio, Texas, and Ameritech Corporation ("Ameritech") a Delaware corporation headquartered in Chicago, Illinois.

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SACCC *et al.* respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, is reported at *South Austin Coalition Community Council et al. v. SBC. Comm. Inc.*, 274 F.3d 1168 (7th Cir. 2001) and is reprinted in the appendix hereto at 1a. Rehearing *en banc* was denied, and the order is reprinted in the appendix hereto at 42a.

The opinion and order of the United States District Court of the Northern District of Illinois, Eastern District (Manning, J.) granting and entering judgment for SBC and Ameritech is reported at 2001 U.S. Dist. LEXIS 9850, and is reprinted in the appendix hereto at 11a.

STATEMENT OF JURISDICTION

The District Court's jurisdiction was based upon 15 U.S.C. § 4 and 28 U.S.C. § 1331. The Appellate Court had jurisdiction pursuant to 28 U.S.C. § 1291.

The Opinion of the Seventh Circuit Court of Appeals was entered December 19, 2001. A timely petition for rehearing *en banc* was filed on January 2, 2002, and was denied on February 4, 2002.

Jurisdiction of the Supreme Court of the United States to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statute is 15 U.S.C. § 18, which is reprinted in the appendix hereto at 44a.

INTRODUCTION

This case presents a recurring issue of public importance about antitrust scrutiny in telecommunication mergers, in light of the enactment of the Congressional policy of deregulation apart of the the 1996 Telecommunications Act.[1]

The United States Court of Appeals for the Seventh Circuit entered its decision on December 19, 2001 upholding the Petitioners standing, as customers, to challenge the merger, but found antitrust scrutiny precluded by the third paragraph of 15 U.S.C. § 18 (the common carrier line extension proviso) intended in 1914 to preclude scrutiny to a market-expanding acquisition by a non-competitor, strictly regulated as to its own entry.

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1. This Court has reviewed many issues raised by the enactment of the 1996 Telecommunications Act, including issues impacting restructuring of local markets and ILEC rates. *AT&T et al. v. Iowa Utilities Board et al.*, 525 U.S. 366 (1999) (restructuring of local telephone markets); *National Cable & Telecommunications Association Inc. v. Gulf Power et al.*, 534 U.S. 327 (2002) (pole attachments); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (scrambling issues); *Reno v. ACLU*, 521 U.S. 844 (1997) (Communications Decency Act); *Verizon Comm. Inc. v. FCC et al.*, 531 U.S. 1124 (2001), *WorldCom, Inc. et al. v. Verizon Comm. Inc. et al.*, 531 U.S. 1124 (2001), *FCC et al. v. Iowa Utilities Board et al.*, 531 U.S. 1124 (2001), *AT&T Corp. v. Iowa Utilities Board et al.*, 531 U.S. 1124 (2001), *General Comm. Inc. v. Iowa Utilities Board et al.*, 531 U.S. 1124 (2001) (interconnection rates and ILECs)

This case is of utmost public importance because it creates a giant and unanticipated loophole, completely frustrating Congressional purpose both from 1914 and 1996, and would preclude both the government and private parties from any relief now and in future telecommunication mergers. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) (important issues addressed "to the public as distinguished" from the "parties" to the litigation). The issue Petitioners seek certiorari for prospectively allows for the reconsolidating of all the "baby Bells" without authority for any entity, private or governmental, to challenge on an antitrust basis. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1995) (the issue posed by this case is direct and immediate to all local telephone customers, not merely an "academic or [] episodic" issue); Stern, *Supreme Court Practice*, 6th Ed., at 213.

With the enactment of the 1996 Telecommunications Act and the deregulation of the telephone industry, this first impression issue and error of the Court of Appeals is likely to have serious consequences soon replicated by the recombination of baby Bells among themselves, or with other major long distance carriers or cable television companies. *See* Stern, *Supreme Court Practice*, 6th Ed., at 223 *citing*, Baker, *A Practical Guide to Certiorari*, 33 Cath. U.L. Rev. 611, 619 (1984). The Appellate Court's interpretation is clearly in error — relying upon a single case interpreting the clause in far different factual circumstance, not in the context of telephone deregulation or enactment of the 1996 Telecommunications Act.

STATEMENT OF THE CASE

The Trial Court Decision.

Ameritech customers in Illinois challenged the merger of SBC and Ameritech seeking injunctive relief because the "effect of such acquisition may be substantially to lessen competition or tend to create a monopoly." The merger eliminated the only actual and potential competition regarding price and quality of residential phone service in the relevant market (Chicago, Illinois area as well as St. Louis, Missouri, area).

Plaintiffs plead, and the post-merger record demonstrated actual and threatened injury in the form of price increases, ongoing admitted lack of quality service, and a lack of consumer choice for local telephone service. The merger eliminated the sole competitor and strongest, most likely potential full scale competitor each faced.

Plaintiffs filed their complaint after the final agency review as directed in *SACCC et al. v. SBC. Comm. Inc.*, 191 F.3d 842, 845 (7th Cir. 1999), based on the findings of the FCC and state public utility commissions that actual and potential competition was squelched, an increase in the Herfindahl-Hirschman Index of over 400 points, and other facts showing increase in prices and decrease in service.

The District Court dismissed the case for a "lack of standing," stating that three agencies had previously reviewed the merger and Plaintiffs' complaint lacked specificity in alleging an antitrust injury.

The Appellate Court Decision.

The Appellate Court held, "official approval does not immunize a phone merger against private antitrust challenge" *citing* 15 U.S.C. § 18, and holding that the "private plaintiffs are free to seek divestiture." *SACCC*, 274 F.3d 1168, *citing*, *California v. American Stores Co.*, 495 U.S. 271 (1990).

The Court of Appeals went on to hold that Plaintiffs alleged "a diminution in potential competition, rather than a merger between firms currently competing in overlapping markets," and that "an exception to § 7 of the Clayton Act carves out of its scope a merger of common carriers that do not directly compete."

The Court held that SBC and Ameritech are common carriers "extending" its lines by merger, with "no substantial competition between" them. The Court relied on the lone decision *Navajo Terminals, Inc. v. United States*, 620 F.2d 594 (7th Cir. 1979), where the appellate court applied this language in a motor carrier case.

The Facts of the Case.

In the spring of 1998, SBC and Ameritech, Incumbant Local Exchange Carriers ("ILEC") announced their intention to merge. At that time, the two ILECs created by the break up of AT&T, were actually competing and had intentions and plans to enter each other's territories. The FCC concluded that the Respondents were the most significant potential entrants for providing competitive local service.[2]

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2. "Ameritech's internal documents show that the firm had already announced its intention to enter SBC's St. Louis market and was actively implementing

(Cont'd)

The Petitioners filed their initial case which was dismissed as not ripe and was affirmed on appeal, *SACCC et al. v. SBC Comm. Inc.*, 191 F.3d 842 (7th Cir. 1999) (with the proviso that Plaintiffs' claim could be refilled if and when final merger terms were determined). Plaintiffs refilled their complaint shortly after the final agency review as directed in *SACCC*, 191 F.3d at 845.

No factual discovery occurred. However, a factual record was developed in the pleadings based upon the findings of the FCC, the Department of Justice, and the Illinois Commerce Commission ("ICC") and other state public utility commissions. Because of the importance of quality local phone service a large press record also developed, as well as

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(Cont'd)

> those entry plans at the time the merger was announced. Once the proposed merger was announced Ameritech suddenly abandoned these plans." FCC Order at ¶ 78.
>
> "The evidence in the record indicates that SBC had plans to enter the mass market in Chicago building off its cellular base in that city, and could thus be viewed as a potential entrant into this market." FCC Order ¶ 82.
>
> Thus, both firms have the capabilities and incentives to be considered most significant market participants in geographic areas adjacent to their own regions based on Ameritech's expansions into St. Louis (in SBC's territory) which would have occurred but for their merger, and SBC's plans to expand into Chicago (in Ameritech's territory). The FCC "conclude[d] that SBC was a significant potential entrant into Ameritech's region." FCC Order ¶ 77, 78 & 83.

a post-merger record based on FCC and ICC fines for poor SBC service and failure to meet certain conditions.

The resulting company after the merger controls essentially all local phone service in the areas that it services.[3] It was alleged the new company will control 31% of the Telephone Access Line Market in the United States, and because of SBC's prior combination with Pacific Telesis in California, the merger reconsolidates three of the original seven Bells (Ameritech, Southwest Bell, and Pacific Telesis).

Prior to announcing the merger, Ameritech planned and declared its intention to enter SBC's St. Louis market in order to compete for local telephone service customers. Plaintiff alleged, and the FCC's Order bore out, the merger eliminates the very likely possibility of SBC and Ameritech competing against each other in the most likely new expansion areas (i.e. each other's neighboring pre-merger markets). SBC has also experimented with plans for entering local markets with its Rochester, New York Plan.[4] SBC had also sought and received authorization to conduct local service in Illinois.

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3. Besides the ILECs Bells, approximately one dozen "competitive local exchange carriers" ("CLECs") compete for local telephone service. There is little actual competition generated by CLECs, they control less than 1% of local telephone lines. Further, CLECs face tremendous barriers to entry into new markets. Since the merger, these figures have remained relatively constant. Van, *Finding Disputes Ameritech Claim of Competition*, Chicago Tribune, April 18, 2001.

4. The FCC Order "conclude[d] that Project Gateway was cancelled because SBC and Ameritech *preferred to merger rather than compete in the mass market for local exchange and exchange access service in St. Louis and perhaps elsewhere*." FCC Order at ¶ 79. (Emphasis added). (App. at 49a)

The FCC Order explicitly found SBC and Ameritech had plans to enter each other's regions, and these plans were abandoned by the merger. *See* FCC Order at ¶¶ 77, 78. (App. at 48a).

The FCC Order also stated SBC was a "significant potential entrant" into the Chicago residential market. *See*, FCC Order at ¶¶ 81, 82, 83. (App. at 50a-54a).

The post-merger record demonstrated antitrust damages prevalent in the factual record. SBC continues to factor in payments of millions of dollars each month as a toll charge to regulators for poor service and a lack of competition. SBC's post-merger exercise of monopoly power includes a recurring deterioration of service combined with drastically increased charges to consumers. SBC has continued paying fines in the millions to the regulators without paying anything to the class. SBC's antitrust fines are easily absorbed as a minimal cost of business, without benefit to the class.

There Is Still Virtually No Meaningful Competition/ Choice for Local Phone Customers. CLEC's share of end-users lines served at 5% in Illinois; FCC Report, *Local Telephone Competition at the New Millennium*, Released August 31, 2000, Table 4, "End-User Lines Served by Reporting LECs: Year-End 1999.

Illinois Local Residential Service has Substantially Worsened. The State of Illinois has made findings of poor service to competitors and failing to meet merger conditions. Van, *Ameritech Assessed $873,500 For Service Faults*, Chicago Tribune, September 23, 2000. The press report stated, Ameritech payments were "to compensate [competitors] for inadequate service" attributed to an

unnamed Ameritech spokesman. *Shockingly*, only a few months earlier, Ameritech's President of Illinois, Joset Wright, said, "Ameritech is in full compliance . . . [t]here's not one condition that we haven't met." Van, *SBC not complying with ICC, rivals say*, Chicago Tribune, May 10, 2000; Ameritech Letter, Mr. Mueller informing customers of the $19 credit for a lack of "quality service."

On July 25, 2001, the Chicago Sun-Times reported, Ameritech paid $24 million in the last 12 months for failing to meet competitive standards. Fendelman, *Ameritech Sets Record With Fine Amount in May*, Chicago Sun-Times, July 25, 2001; SBC has paid "$69 million in penalties" since December for "substandard wholesale phone service" to the federal government, but would have paid $106 million if the fines were not capped. Young, *SBC Has Paid Big Penalties For Poor Service to Rivals*, Wall Street Journal, August 8, 2001.

Major Increase in Fees and Other Charges By SBC. In August 2000, SBC/Ameritech sought a $2 a month hike in the residential phone rate. Van, *Ameritech files for higher line charge*, Chicago Tribune, August 4, 2000.

Sharp Marketing Practices. SBC raised rates on 411 information calls (raised to 95 cents from 30 cents); and increased rates by 25% for local calls; SBC also squeezed consumers by requiring its employees to convert every customer contact into a high power sales pitch for higher-priced premium services regardless of whether a particular customer would benefit from the program Jones, Crain's Chicago Business, *Telcom Rate Showdown For SBC-Ameritech*, Feb 28, 2000; Manor, Chicago Sun-Times, *Ameritech Under Fire, CUB to take action against sales method*, March 8, 2000; and Editorial,

Information Tollways, Chicago Sun-Times, Feb. 18, 2000; Manor, Chicago Sun-Times, *Ameritech hikes some local calls*, Jan. 27, 2000; Manor, Chicago Sun-Times, *411 calls jump to 95, Ameritech hikes rates*, February 17, 2000; Van, Chicago Tribune, *Ameritech files for Higher Line Charge*, August 4, 2000.

Unique Among the Baby Bells, SBC Continues to Turn a Profit. The FCC reported that total telecommunication revenues including local services for incumbent LECs rose from $108,234 (Shown in Millions) in 1998 to $112,216 in 1999. FCC Report, *Local Telephone Competition at the New Millennium*, Released August 31, 2000, Table 7 "Total Telecommunications Revenue."

SBC Threatens to Worsen Service Further. In its monopoly position SBC is now able to threaten to reduce service further unless Illinois regulators lessen oversight. Holt, *Ameritech Threatens State with Cutbacks*, Chicago Tribune, March 14, 2001.

Finally, this case occurs in the context of the consent decree that broke up AT&T. The consent decree was "replaced" by provisions of the Telecommunications Act of 1996. *SBC Comm., Inc. et al., v. FCC*, 981 F. Supp. 996, 1000 (N.D. Tex. 1997). Further, "deregulation" properly characterizes the industry since enactment of the 1996 Act. *SACCC*, 191 F.3d at 843, ("[f]ederal legislation during the late 1990s relieved the Baby Bells of many strictures adopted in 1983 . . . setting the stage for more competition"). *See* H.R. Rep. No. 104-204, pt. 1, at 48-50 (1995).

REASONS FOR GRANTING THE WRIT

This case poses important reoccurring public questions of antitrust oversight of the telecommunications industry in the initial stages of deregulation created by the Congressional enactment of the 1996 Telecommunications Act spurring unrivaled industry consolidation[5]. Since deregulation, telecommunication giants have been merging, baby Bells reconsolidating, and consumers (particularly in this case) have received less service at greater prices without consumer choices, as telecommunication giants, like SBC, have been willing to pay fines as toll charges to public agencies for continued slack oversight based on a public interest standard — not an antitrust basis.[6]

In this case the decision of the United States Court of Appeals for the Seventh Circuit disregarded the caution by which courts examine exemptions from the antitrust laws. *Chicago Prof. Sports Ltd. v. National Basketball Ass'n*, 961 F.2d 667, 672 (7th Cir. 1992). In this case, the Court of Appeals summarily created a major loophole in antitrust enforcement and telecommunications policy. The Court of Appeals held that the local telephone companies created by the break-up of AT&T can merge back together free of any antitrust scrutiny. The decision is not only contrary to the plain meaning of the text of the Clayton Act as the statute

5. For example, NYNEX and Bell Atlantic, PacTel and SBC, and WorldCom and MCI.

6. *See*, FCC Commissioner Powell, *Opening Statement* Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce on The Telecommunications Merger Act of 2000, March 14, 2000 (contrasting FCC review with that of the federal antitrust authorities).

was understood by lawmakers in 1914, and the original intent of that provision, but it completely contradicts Congressional intent in refashioning telecommunications policy in the Telecommunications Act of 1996.

The Seventh Circuit's construction of § 7 of the Clayton Act is contrary to Supreme Court jurisprudence requiring broad construction of general laws like the Clayton Act, and narrow construction of special interest exemptions. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

I. The Plain Meaning and Legislative History of "Common Carrier" in 15 U.S.C. § 18, Refers to Entities Which Are *Regulated* Common Carriers and Was Never Intended to Apply to the Merger of Companies Such as SBC and Ameritech That Were Free to Enter Each Other's Markets.

When Congress created the anti-merger provisions of the Clayton Act, 15 U.S.C. § 18, it included a paragraph providing that the statute would not prevent a "common carrier from extending any of its lines [through the acquisition of] any other common carrier where there is not substantial competition between [them]." The first sentence of this same paragraph makes it applicable only to "any common carrier subject to the laws to regulate commerce." Courts who employ a textualist approach to statutory interpretation insist that a statute be construed on the basis of which meaning is "most likely to have been understood by the *whole* Congress which voted on the words of the statute." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring). In 1914, the concept of a regulated common carrier free to enter another geographic market without

encountering substantial regulatory barriers, in order to compete with the dominant regulated common carrier in that new market, was completely foreign. Thus, that phrase must be construed to refer only to those common carriers whose entry, as well as price or other aspects of doing business, was regulated by the government.

The legislative history of the common carrier proviso demonstrates both the rationale for the exemption and its inapplicability to the SBC-Ameritech merger challenged in this litigation. The theory of the complaint is that SBC was uniquely positioned to threaten Ameritech's monopolistic exploitation Chicago land consumers, and would have entered the market but for the merger. FCC findings support this conclusion.[7] Such a strategy by SBC would have been

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7. "Ameritech's internal documents show that the firm had already announced its intention to enter SBC's St. Louis market and was actively implementing those entry plans at the time the merger was announced. Once the proposed merger was announced Ameritech suddenly abandoned these plans." FCC Order at ¶ 78. (App. at 48a).

"The evidence in the record indicates that SBC had plans to enter the mass market in Chicago building off its cellular base in that city, and could thus be viewed as a potential entrant into this market." FCC Order at ¶ 82. (App. at 52a).

Thus, both firms have the capabilities and incentives to be considered most significant market participants in geographic areas adjacent to their own regions based on Ameritech's expansions into St. Louis

(Cont'd)

nonsensical in 1914, for new entry would not have been permitted absent lengthy regulatory proceedings where the entrenched incumbent would strongly argue that there was no public need for the entry. Thus, telephone as well as railroad mergers of this sort were likely to "inure to the benefit of the public." *See* Kintner, Legislative History of the Federal Antitrust Law and Related Studies 1748 (1978).

The Appellate Court's decision in *Navajo Terminals Inc. v. United States*, 620 F.2d 594, 601 (7th Cir. 1977) sheds no light on the argument or the Court of Appeal's faulty reasoning. The *Navajo* decision was based on a regime of regulated entry that rendered inappropriate the application of the potential competition theory upon which this complaint is based.

Further, in *Navajo*, there was a finding that there was no substantial competition between the two companies. In this case, the FCC Order established the opposite: prior to announcing the merger, Ameritech planned and declared its intention to enter SBC's St. Louis market, that SBC has also experimented with plans for entering local markets with its Rochester, New York Plan; SBC had also sought and received authorization to conduct local service in Illinois. The FCC Order explicitly found SBC and Ameritech had plans to enter each other's regions, and these plans were abandoned by the merger. FCC Order at ¶¶ 77, 78; (App. at 48a). Finally, the

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> (in SBC's territory) which would have occurred but for their merger, and SBC's plans to expand into Chicago (in Ameritech's territory). The FCC "conclude[d] that SBC was a significant potential entrant into Ameritech's region." FCC Order at ¶¶ 77, 78 & 83. (App. at 48a-54a).

FCC Order also stated SBC was a "significant potential entrant" into the Chicago residential market. FCC Order at ¶¶ 81, 82, 83. (App. at 50a).

Finally, in *Navajo* the Court stated that "the draftsman of § 7 held that without the common carrier proviso, § 7 might or would prevent merger of carriers which accomplished desirable line extensions." *Navajo*, 620 F.2d 601. Here, it is nearly impossible to consider the case to be a line extension, let alone desirable. The deregulated market does allow consumers access to phone service, SBC and Ameritech chose to merge rather than compete.

The factual record established that SBC's factored in payment of millions of dollars of fines, while exercising monopoly power includes a recurring deterioration of service combined with drastically increased charges to consumers including: virtually no meaningful competition/choice for local phone customers; worsened local residential service; major increase in fees and other charges; suffering sharp marketing practices; all the while SBC continues to turn a profit and threatens to worsen service further if regulation is not loosened more.

II. In Drafting the Telecommunications Act of 1996, Congress Clearly Intended That a Merger Between Two "Baby Bells" Would Not Be Exempt from Antitrust Scrutiny.

Prior to the 1996 Telecommunications Act, § 221(a) of the predecessor Communications Act actually empowered the FCC to confer antitrust immunity on telephone company mergers that the FCC found to be in the public interest. *MCI Comm. Corp. v. AT&T*, 708 F.2d 1081, 1100 (7th Cir.

1982). Similarly, the final paragraph of § 7 of the Clayton Act exempted FCC-approved mergers from antitrust scrutiny. The 1996 Act repealed § 221(a) to remove this regulatory insulation and correspondingly amended § 7 of the Clayton Act, 15 U.S.C. § 18, to eliminate the FCC's ability to insulate transactions. 1996 Act §§ 601(b)(2), (3).

The Telecommunications Act of 1996 "represents a comprehensive effort by Congress to bring the benefits of deregulation and competition to all aspects of the telecommunications market in the United States, including especially local markets." *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 391 (7th Cir. 2000). The Act anticipated that incumbent local monopolists would strongly resist this effort, which would make it very difficult for new entrants to compete.[8]

Congress' failure to repeal the paragraph of § 7 of the Clayton Act, upon which the Court of Appeals relied to dismiss Petitioners complaint, is simply understood by the fact that in passing the 1996 Act Congress understood the phrase "common carrier" to be inapplicable to the reintegration of the baby Bell ILECs.

This explanation interprets both the Clayton Act and the Telecommunications Act in a manner "most compatible with

8. Indeed, pursuant to the Act, the FCC has recently fined SBC almost $2 million for improper conduct in frustrating new entry, and the D.C. Circuit has just found that SBC has not permitted effective competition in its areas of dominance. Communications Today, *SBC Pays $1.95 Mn Penalty*, Dec. 28, 2001; *Sprint Communications Co. L.P. v. FCC*, 2001 US App. Lexis 27292, *see* Dreazen, *Court Says SBC Overcharges Competitors, Tells FCC to Review Long-Distance Decision*, Wall Street Journal, Dec. 31, 2001.

the surrounding body of law in to which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress always has in mind." *Green v. Bock Laundry*, 490 U.S. 504, 528 (1989) (Scalia, J.).

The Court of Appeals reading of § 7 means that the baby Bells could all merge back into one company for purposes of providing local telephone service. Such an interpretation would so clearly frustrate the clear Congressional intent behind opening up local markets to competition that it would be a patently absurd result that Congress could not possibly have intended, and which this Court should refuse to sanction. *See United States v. Brown*, 333 U.S. 18, 27 (1948); *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting).

The Conference Report on the Telecommunications Act makes this clear:

> The conference agreement adopts the House antitrust savings clause with modifications. The antitrust savings clause provides that except as provided in paragraphs two and three, nothing in this Act or the amendments made by the conference agreement shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. The clause was modified to include the repeal of section 221(a) of the Communications Act (47 U.S.C. 221(a)). Congress enacted section 221(a) in the days when local telephone service was viewed as a natural monopoly. Its purpose was to allow competing local telephone companies to merge without facing antitrust scrutiny. Thus, the statute provides

that when any two telephone companies merge, the Commission should determine whether the merger will be "of advantage to the persons to whom service is to be rendered and in the public interest." If so, the Commission can render the transaction immune from "any Act or Acts of Congress making the proposed transaction unlawful." In a world of regulated monopolies, this idea made sense.

However, section 221(a) could inadvertently undercut several of the provisions of the Telecommunications Act of 1996. The problem arises for at least two reasons. First, the critical term "telephone company" is not defined. In the old world of regulated monopolies, a definition probably was not necessary. However, in the new world of competition, many companies will be able to argue plausibly that they are telephone companies.

Second, section 221(a) allows the Commission to confer immunity from any Act of Congress (including the Telecommunications Act of 1996) after performing a public interest review. Section 221(a) could be used to avoid the cable-telco buyout provisions of the Telecommunications Act of 1996. Any cable company that owned any telephone assets could become a telephone company and be bought out by a BOC by applying for immunity under this section.

In addition, if immunity were conferred under section 221(a), it would allow mergers between

telecommunications giants to go forward without any antitrust or securities review. In the old world, the statute was usually used to confer immunity on mergers between non-competing Bell operating subsidiaries or mergers between Bells and small independents within their territories. Neither of these situations involved competitive considerations.

However, in the future, the conferees anticipate that cable companies will be providing local telephone service and the BOCs will be providing cable service. Mergers between these kinds of companies should not be allowed to go through without a thorough antitrust review under the normal Hart-Scott-Rodino process. The new language contains a conforming change to clarify that these mergers will now be subject to Hart-Scott-Rodino review. By returning review of mergers in a competitive industry to the DOJ, this repeal would be consistent with one of the underlying themes of the bill to get both agencies back to their proper roles and to end government by consent decree. The Commission should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws. The repeal would not affect the Commissions ability to conduct any review of a merger for Communications Act purposes, e.g. transfer of licenses. Rather, it would simply end the Commissions ability to confer antitrust immunity.

The conference agreement adopts the House provision stating that the bill does not have

> any effect on any other Federal, State, or local law unless the bill expressly so provides. This provision prevents affected parties from asserting that the bill impliedly preempts other laws.

Telecommunications Act of 1996 Conf. Report, No. 104-458, at 200, Jan. 31, 1996.

The decision of the Court of Appeals creates a major loophole in antitrust enforcement and completely frustrates the telecommunications policy of local competition expressed by the Congress.

CONCLUSION

The petition for writ of certiorari should be granted and the case set for briefing and argument.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED DECEMBER 19, 2001

In The
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 00-3864

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, *et al.*,

Plaintiffs-Appellants,

v.

SBC COMMUNICATIONS INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 7232 — **Blanche M. Manning**, *Judge.*

Submitted November 14, 2001* — Decided December 19, 2001

Before EASTERBROOK, KANNE, and EVANS, *Circuit Judges.*

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* This appeal has been assigned to the panel that resolved the initial appellate proceedings concerning this merger. See Operating Procedure 6(b). The panel has concluded that a second oral argument is not necessary.

Appendix A

EASTERBROOK, *Circuit Judge.* SBC Communications and Ameritech — two of the Baby Bells created by the breakup of AT&T in 1983 — merged in 1999 after receiving approval from the Federal Communications Commission and several state regulators. The Antitrust Division of the Department of Justice declined to file suit. But this did not deter the plaintiffs in this case, which have sued twice. The first suit, filed before SBC and Ameritech had obtained the necessary administrative approvals, was dismissed as premature. 191 F.3d 842 (7th Cir. 1999). This second suit, filed immediately after the approvals, has been dismissed for want of standing. 2001 U.S. Dist. LEXIS 9850 (N.D. Ill. June 22, 2001).

When the local-service subsidiaries of AT&T were spun off in the 1980s, most people assumed that local phone service is a natural monopoly. This was a premise of the divestiture, and each Baby Bell was constituted as a monopoly in its service area. By the time of the merger the technological basis of this natural-monopoly assumption had come into serious question, and the legal barriers to competition also were in the process of being dismantled. Thus the antitrust objection to the merger was based on potential rather than ongoing competition. The agencies were concerned — and in this suit the plaintiffs contend — that, had SBC and Ameritech not merged, each would have entered the other's core markets and created extra competition to consumers' benefit. The complaint alleges, for example, that but for the merger SBC would have begun to offer local phone service in Chicago (part of Ameritech's original territory), and Ameritech would be offering local service in St. Louis, an area assigned to SBC in the AT&T divestiture. The FCC

and the Antitrust Division concluded that, even if this is so, many other rivals remain — and that as a practical matter there is effective competition between land lines and cellular service, so that competition prevails even in markets that have a single land-line local-service provider. But official approval does not immunize a phone merger against private antitrust challenge; § 7 of the Clayton Act, 15 U.S.C. § 18, confers immunizing power on the Surface Transportation Board, the Federal Power Commission, and several other bodies, but not on the FCC or the Antitrust Division. So private plaintiffs are free to seek divestiture. See *California v. American Stores Co.*, 495 U.S. 271 (1990).

Plaintiffs allege that the merger has reduced long-run competition. This implies not only injury-in-fact (the core of the Article III standing requirement) but also "antitrust injury." That is to say, these plaintiffs complain about the *kind* of injury (reduced output and higher prices) against which the antitrust laws are directed. See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Nonetheless, the district court dismissed the complaint for want of standing. The court's opinion summarizes at length the conclusions of the administrative agencies approving the merger and then states, without additional reasoning, that the allegations of the complaint are too "speculative and vague" to justify putting the administrative conclusions to the test. This approach has nothing to do with standing. Complaints need not be elaborate, and in this respect injury (and thus standing) is no different from any other matter that may be alleged generally.

See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The district court's approach amounts to a conclusion that the complaint fails to state a claim on which relief may be granted — and this is how SBC (the surviving firm in the merger) chooses to treat it. It does not attempt to defend the district court's standing rationale but argues instead that antitrust complaints must be more thorough than the normal civil complaint, the better to curtail the high cost of antitrust litigation by facilitating early disposition.

That is not correct. A pleading is sufficient if it contains

> (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Fed. R. Civ. P. 8(a). Plaintiffs' complaint does all of these things and may not be dismissed just because it does not do more. Rule 9 sets out special pleading requirements for some matters, such as fraud and admiralty, but it does not require extra detail for antitrust suits — and the Supreme Court insists that courts not add to the requirements of Rule 8. See, e.g., *Leatherman v. Tarrant County*, 507 U.S. 163 (1993); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); cf. *Crawford-El v. Britton*, 523 U.S. 574 (1998). Doubtless antitrust litigation is expensive, but Congress has not responded to this expense with extra pleading requirements — as it did, for example,

in the field of private securities litigation. See 15 U.S.C. § 78u-4(b). As long as Rule 8 stands unaltered, and there is no antitrust parallel to the Private Securities Litigation Reform Act, courts must follow the norm that a complaint is sufficient if any state of the world consistent with the complaint *could* support relief. See *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); see also, e.g., *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). It is not necessary that facts or the theory of relief be elaborated. See *Walker v. National Recovery, Inc.*, 200 F.3d 500 (7th Cir. 1999); *Bennett v. Schmidt*, 153 F.3d 516 (7th Cir. 1998). District courts may mitigate the expense of litigation by resolving motions for summary judgment early in the case — in advance of discovery, if appropriate, for summary judgment may be sought at any time. See Fed. R. Civ. P. 56.

Still, a pleader may volunteer enough to show that the claim cannot succeed, and then dismissal under Rule 12(b)(6) follows. See *American Nurses' Association v. Illinois*, 783 F.2d 716 (7th Cir. 1986). Plaintiffs have done just this by alleging that before the merger both SBC and Ameritech were regulated common carriers, each a monopolist of land-lines service in its assigned territory. Thus plaintiffs allege a diminution in *potential* competition, rather than a merger between firms currently competing in overlapping markets. And this is fatal to the suit, because an exception to § 7 of the Clayton Act carves out of its scope a merger of common carriers that do not directly compete. The critical portion of § 7 reads:

> Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws

> to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

15 U.S.C. § 18. Both SBC and Ameritech were common carriers. The last clause of this sentence allows "such common carrier" to "extend" its lines by merger, provided that "there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired." "[S]uch common carrier" must refer back to the introductory clause — a "common carrier subject to the laws to regulate commerce". Do telecommunications carriers meet that description? They are subject to many laws regulating interstate commerce, but the context of this phrase, with its reference to "branches or

short lines," coupled with the date of its enactment (1914), raises the possibility that it covers only railroads subject to the jurisdiction of the Interstate Commerce Commission (now morphed into the Surface Transportation Board). But that would not be the right reading, as we concluded in *Navajo Terminals, Inc. v. United States*, 620 F.2d 594 (7th Cir. 1979), when applying this language to a merger of motor carriers. Section 7 has a *separate* exemption for railroad mergers approved by the Surface Transportation Board; the sentence we have quoted thus would be surplusage if read as limited to railroads. And the legislative history — the *enactment* history, not the fog of words generated by legislators — shows that "common carrier" means *all* common carriers. The version of § 7 that passed by the House used the word "railroad"; the Senate amended this to "common carrier", a broader designation; the House acceded to the Senate's amendment. The Senate's committee report observed that this change was made precisely to "apply to any common carrier, thus including telephone and pipe lines". See Earl W. Kintner, *Legislative History of the Federal Antitrust Laws and Related Statutes* 1748, 2466 (1978), which collects this and related background material. We rely on the legislative deeds, not the accompanying explanation that restates the obvious. Understandably, in light of this history, plaintiffs do not contend that the phrase "common carrier subject to the laws to regulate commerce" is limited to those entities regulated by the Interstate Commerce Commission in 1914.

What plaintiffs do argue is that the world has changed since 1914. When § 7 was enacted, regulated common carriers rarely competed, and then did so only by sufferance of the agencies after securing certificates of public interest,

convenience, and necessity. Today most regulated industries, including telecommunications, have been deregulated in whole or in substantial part; the Telecommunications Act of 1996 plus the advent of wireless phone technology have brought competition to the local phone market, and plaintiffs argue that we should not read the exceptions to § 7 to reduce the force of this competition. The factual premise of this contention is doubtful. In 1914 railroad lines often competed; even when tracks were laid far apart, shippers had a choice of lines. Grain, livestock, and steel could go west from Chicago through St. Louis on the Union Pacific, or over the Northern Pacific lines through Minnesota and the northern tier, or could go by the Illinois Central (or barge down the Mississippi) to the Gulf of Mexico and then by ship through the Panama Canal. Competition among common carriers is not an invention of the late Twentieth Century. Even if competition among common carriers were a novelty, however, this would not affect the meaning of § 7. The world may have changed, but the statute has not. As the Supreme Court remarked in *National Broiler Marketing Association v. United States*, 436 U.S. 816 (1978), when dealing with an antitrust exemption dating to 1920, a change in economic conditions is a challenge to *Congress*, not the courts; and if the legislature leaves exemptions alone, they must be enforced as written. The Supreme Court has not embraced Judge Calabresi's proposal, see Guido Calabresi, *A Common Law for the Age of Statutes* (1982), that old enactments be treated no differently from common law, equally subject to judicial upkeep.

This leaves plaintiffs' argument that potential competition should be treated as "substantial competition

between the company extending its lines and the company whose stock, property, or an interest therein is so acquired" for purposes of § 7. Yet this would leave no work for the exemption to do. It would rewrite § 7 so that mergers of common carriers are exempt from scrutiny if and only if the merger would not violate § 7 in the first place. The only function of this exemption must be to distinguish potential-competition from actual-competition cases. If the merging common carriers do not compete actually *or* potentially, they face no antitrust risk. If they currently (and substantially) compete, then the exemption is inapplicable by its terms. Only potential competition remains to be affected by the exemption; this is the respect in which common carriers differ from, say, manufacturers or financial intermediaries. If two banks merge, the court must consider any reduction in potential competition as well as the reduction in ongoing competition. See, e.g., *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974). But if two common carriers merge, only the reduction in existing competition matters. That's all the exemption in § 7 does; to end its application to potential competition is to wipe the exemption off the books. Leaving potential competition among common carriers to agencies rather than juries is hardly such a surprising step that courts should struggle against the reading. Assessing the significance of potential competition is difficult for the best economists and would be nearly impossible as a subject for trial — especially when regulatory agencies exercise so much control over how common carriers interact.

Appendix A

Plaintiffs' complaint concerns potential competition, for it acknowledges that SBC and Ameritech had lawful monopolies in local land-line service at the time of the merger. What plaintiffs want the district court to examine is the economic effect of eliminating each Baby Bell as a potential entrant into the other's territory. That is exactly the line of inquiry that the common-carrier exemption to § 7 forecloses. Thus although we do not agree with the district court's opinion, its judgment may be sustained on other grounds. The judgment is modified to dismiss the complaint on the merits rather than for lack of jurisdiction, and, as so modified, is

AFFIRMED.

A true Copy:
Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JUNE 22, 2001

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

99 c 7232

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, WALTER E. RYAN, JR., THEODORE CHABRAJA, ANITA B. HULL, ROBERT RIFKIN and PATRICK STEFFES for themselves and for all others similarly situated,

Plaintiffs

v.

SBC COMMUNICATIONS INC. AND AMERITECH CORP.,

Defendants.

MEMORANDUM AND ORDER

Plaintiffs, South Austin Coalition Community Council, Walter E. Ryan, Jr., Theodore Chabraja, Anita B. Hull, Robert Rifkin, and Patrick Steffes (collectively, "plaintiffs") bring this one-count antitrust suit under section 16 of the Clayton Act, 15 U.S.C. § 26, to obtain injunctive relief of divestiture

and/or injunction enjoining the merger of Ameritech Corporation to SBC Communications ("SBC/Ameritech" or "SBC") alleging that the merger threatens to violate section 18 of the Sherman Act [sic.], 15 U.S.C. § 18 because the newly-merged corporation will have monopoly strength, and competition for local telephone service will be substantially lessened. SBC/Ameritech moves to dismiss the suit under Federal Rule of Civil Procedure 12(b)(1) on the basis that the plaintiffs lack standing. For the following reasons, the motion to dismiss the complaint is GRANTED.

I. *Motion to Dismiss*

When considering SBC's motion to dismiss under Fed. R. Civ. P. 12(b)(1), the dismissal is properly granted only if it is clear that no set of facts which the plaintiff could prove consistent with the pleadings would entitle him to relief. *See, Kunik v. Racine County, Wis.*, 946 F.2d 1574, 1579 (7th Cir. 1991) (motion to dismiss under 12(b)(6) for failure to state a claim); *Komorowski v. Townline Mini-Mart and Restaurant*, 162 F.3d 962, 964 (7th Cir. 1998) (per curiam) (motion to dismiss under 12(b)(1) for lack of jurisdiction). *See, e.g., McMath v. City of Gary*, 976 F.2d 1026, 1031 (7th Cir. 1992); *Gillman v. Burlington Northern R.R. Co.*, 878 F.2d 1020, 1022 (7th Cir. 1989). Dismissal is properly granted only if no set of facts which a Plaintiff could prove consistent with the pleadings would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Kunik*, 946 F.2d at 1579, *citing, Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984).

Appendix B

II. *Background*

The following facts are taken from plaintiffs' complaint and are assumed true for the purpose of ruling on the motion to dismiss.

A. The Parties

Since 1976, plaintiff South Austin has been a "grassroots community organization" dedicated to improving the quality of life for citizens in the Austin area. South Austin was also a customer of Ameritech at the time of the merger with SBC — as were all of the individually named plaintiffs.

SBC is a Texas corporation headquartered in San Antonio, Texas. In 1983, when AT&T was divested of its monopoly over local phone service, SBC was one of the seven regional bell operating companies ("RBOCs") which was formed by consent decree. *United States v. American Tel. & Tel.*, 552 F. Supp. 131 (D.D.C. 1982). Before the merger, SBC transacted business and served customers primarily in the southern and western states.

B. The Merger and Agency Reviews

Ameritech was a Delaware corporation and was headquartered in Chicago, Illinois. Ameritech was also an RBOC and it transacted business and served customers primarily in the midwest states.

On May 10, 1998, SBC and Ameritech agreed to merge their telephone service companies. The resulting corporation

will result in SBC having control of the local telephone service in twelve states which allegedly equates to 31% of the national telephone service market share.

On April 8, 1999, the Public Utilities Commission of Ohio (or, "PUC Ohio") issued an order that approved the merger subject to certain conditions.

On August 2, 1999, the Department of Justice (the "DOJ") and SBC entered into a consent decree which was approved in the United States District Court, District of Columbia. *See, United States v. SBC Comm. Inc., and Ameritech Corp.*, 1999 WL 121145 (D.D.C. August 2, 1999). The consent decree required SBC/Ameritech to divest themselves of ownership of cellular phone services in overlapping markets.

On September 23, 1999, the Illinois Commerce Commission (the "ICC") issued an order approving the merger subject to certain conditions.

Likewise, on October 6, 1999, the Federal Communications Commission an order approving the merger subject to certain conditions.

C. Previous Litigation

In January 1999, this court dismissed plaintiffs' original complaint because it was filed before the reviewing federal and state agencies were afforded the opportunity to review the merger. *See, South Austin Coalition Community Council, v. SBC Comm.*, 1999 WL 955910 (N.D. Ill. January 26, 1999), *aff'd*, 191 F.3d 842 (7th Cir. 1999).

III. *Applicable Law*

A. Clayton Act

Plaintiffs seek an injunction under the Clayton Act, alleging that the merger poses a threat of antitrust injury. Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . .

B. Sherman Act

Plaintiffs specifically allege that the "threatened loss or damage by a violation of the antitrust laws" exists because the merger violates Section 18 of the Sherman Act, "Acquisition by one corporation of stock of another," which provides that:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in

> any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18.

Plaintiffs allege that the SBC/Ameritech merger poses a Sherman Act Injury because it gives SBC monopoly power, lessens competition, and poses high barriers to entry for competitors.

IV. *Discussion*

A. Standing Requirements Under the Clayton Act

A plaintiff may bring suit under both Sections 4 and 16 of the Clayton Act. Section 4 requires a plaintiff to demonstrate that he has suffered an antitrust injury to business or property. Clayton Act, § 4, 15 U.S.C. § 15. Section 16 of the Clayton Act, 15 U.S.C. § 26, provides that a plaintiff "shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . ."

In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S. Ct. 484 (1986), the Supreme Court noted that, unlike actions under § 4, a § 16 claim does not require a plaintiff to demonstrate actual injury, but only a showing of a "threatened" loss or damage. The threatened injury, though,

must be of the kind that the antitrust laws were designed to prevent. 479 U.S. at 111, 107 S. Ct. at 489-490. Standing under § 16 "requires proof of a threatened loss or damage by a violation of the antitrust laws." *Id.*, 479 U.S.C. at 111, 107 S. Ct. at 490; *see*, *O'Neill v. Coca-Cola Co.*, 669 F. Supp. 217, 221 (N.D. Ill. 1987) ("Thus, a plaintiff seeking standing under Section 16 must show a threatened antitrust injury which is proximately caused by conduct constituting an antitrust violation. Unless each aspect of this test is met, standing under Section 16 will not exist.") The Supreme Court reiterated this position in *California v. American Stores Company*, when it held that "[a] private litigant . . . must have standing — in the words of § 16, he must prove 'threatened loss or damage' to his own interests in order to obtain relief." 495 U.S. 271, 290, 110 S. Ct. 1853, 1867 (1990).

A. Agency Review and Conditions Imposed

SBC argues that this merger has been the subject of extensive agency review and substantial conditions have been implemented to secure consumer protection. Specifically, they argue that the FCC, the Ohio Public Utilities Commission ("Ohio PUC"), and the Illinois Commerce Commission ("ICC") reviewed and approved the merger and "each imposed substantial conditions promoting increased local competition." Further, SBC argues that the agency review followed the review conducted by the DOJ, which approved the merger subject to the condition that the two companies divest their cellular businesses which overlapped into each other's market.

Appendix B

1. The FCC Review

Both parties agree that the FCC reviewed the merger under the statutory public interest test. Under the Federal Communications Act, the FCC's determination under the public interest test requires the FCC to analyze if the proposed merger "demonstrated that the public interest would be served by transferring Ameritech's numerous licenses and lines used in interstate or foreign communications to SBC." *In re Applications of Ameritech Corp., Mem. Op. And Order*, DA 99-279, ¶ 46 (FCC Oct. 6, 1999). The public interest test required the FCC to inquire whether "on balance, the merger serves the public interest, convenience and necessity." *Id., see*, 47 U.S.C. §§ 214(a), 303(r), 310(d).

SBC hastens to add that the FCC's opinion stated that:

> "the Commission's analysis of public interest benefits and harms includes, but is not limited to, an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. While an antitrust analysis, such as that undertaken by the DOJ in this case, focuses solely on whether the effect of a proposed merger 'may be substantially to lessen competition,' the Communications Act requires the Commission to make an independent public interest determination, which includes evaluating public interest benefits or harms of the merger's likely effect on future competition." *See, FCC Order*, ¶ 49., *quoting*, 15 U.S.C. § 18 (Sherman Act).

Thus, "in order to find that a merger is in the public interest . . . the Commission must be convinced that it will enhance competition." *Id.* (quotations omitted). SBC argues that the FCC's review "imposed unprecedented and far reaching conditions on [SBC/Ameritech]" not only to see that competition was unharmed, but also set conditions that enhanced competition.

a. The FCC's Analysis and the Goals of the Conditions

The FCC noted that "unlike the role of the antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon its extensive telecommunications regulatory and enforcement experience to impose and enforce certain types of conditions that tip the balance and result in a merger yielding overall positive public interest benefits." *Id.* at ¶ 52. To that end, the procedure to adopt conditions to the merger was conducted in the public forum "at which numerous citizens, representatives of citizen groups, and industry members spoke. The staff also met extensively in individual sessions, with dozens of individuals, groups and firms, both before and after the Applicants placed on the public record, for full public commentary, an initial version of their supplemental proffered conditions." *Id.* at ¶¶ 351-353.

As a result of the discussions and hearings, the FCC adopted, with modifications, conditions proffered by SBC. The conditions are effective for a period of 36 months after the date of the FCC's approval. The FCC's order stated that the conditions "are designed to accomplish five primary

public interest goals: (a) promoting equitable and efficient advanced services deployment; (b) ensuring open local markets; (c) fostering out-of-territory competition; (d) improving residential phone service; and (e) ensuring compliance with and enforcement of the conditions." *Id.* at ¶ 355.

The FCC stated that the conditions were not intended to "limit the authority of state commissions to impose or enforce requirements that go beyond those adopted in this Order." *Id.* at ¶ 358. Therefore, the door was left open for state regulators to further protect the interest of consumers by adopting conditions in addition to those in the FCC order.

b. The FCC's Conditions

The FCC order sets forth approximately thirty different conditions for its approval of the SBC/Ameritech merger. The conditions are wide-ranging and require SBC to take measures to improve service for consumers and promote open markets.

The conditions fall within five different areas: 1) promoting equitable and efficient advanced services deployment; 2) ensuring open local markets; 3) fostering out-of-territory competition; 4) improving residential phone service; and 5) ensuring compliance with and enforcement of the conditions.

Appendix B

i) Promoting Equitable and Efficient Advanced Services Deployment

Under this classification, SBC is required to meet several conditions. SBC must create "one or more separate affiliates to provide all advanced services (defined as inter/intrastate wireline telecommunications services (DSL services)) in the newly-merged SBC/Ameritech region." In its order, the FCC stated that this condition "will greatly accelerate competition in the advanced services market by lowering the costs and risks of entry . . ." *Id.* at 363. SBC's compliance will be subject to an annual audit. *Id.* at 365.

SBC must offer other carriers a surrogate line-sharing discount. The FCC's order explains that a line can be separated into a voice channel and an advanced series channel which can be carried simultaneously. Hence, "line sharing potentially enables each service to be provided by a different carrier." *Id.* at 369. While the conditions do not call for SBC to allow for line sharing with unaffiliated carriers, the FCC approved an interim solution that compels SBC to provide to other carriers a "second loop" to competitors at a substantial discount: "In this manner, the conditions require SBC/Ameritech to offer competing carriers the economic equivalent of line sharing until line sharing becomes available to unaffiliated carriers." *Id.*

Further, the conditions require SBC to "develop and deploy common electronic OSS [operations support systems] interfaces across all 13 SBC/Ameritech states to be used by any telecommunications carrier, including the merged firm's advanced service affiliates . . ." The FCC's order explained

that "this condition will guard against discrimination by the merged entity toward its rivals while, at the same time, lower those rivals' costs providing competing advanced services." *Id.* at 371.

SBC must also file with state commissions cost studies and proposed rates for conditioning loops used in the provision of advanced services. The FCC's order stated that the condition "is designed to ensure that SBC/Ameritech will not erect a barrier to the competitive deployment of advanced services by charging excessive rates for loop conditioning." *Id.* at 375. Further, SBC has agreed "[a]s a means of ensuring that the merged firm's rollout of advanced services reaches some of the least competitive market segments and is more widely available to low-income consumers, [it] will target their deployment of xDSL services to include low-income groups in rural and urban areas." *Id.* at ¶ 376.

ii) Ensuring Open Local Markets

The second classification of conditions, "ensuring local markets," was placed on the merger to promote competitiveness in local markets.

The "carrier-to-carrier performance plan" condition requires SBC to file performance measurement data for each of the thirteen SBC in-region states. The data will reflect SBC's performance of their obligations to their competitors in more than twenty measurement categories. *Id.* at ¶ 377.

Further, as part of these conditions, the FCC's order states that "effective, nondiscriminatory access to OSS

["Operations Support Systems"] is critical for achieving the 1996 [Federal Telecommunications] Act's local competition objectives." This requirement calls for SBC/Ameritech to "establish, in consultation with competitive LECs [local exchange carriers], uniform OSS interfaces and systems across their 13 in-region states that are based on the best practices . . . of the two companies." *Id.* at ¶ 381.

SBC will also "assist smaller competitors and new entrants by requiring [SBC] to recover electronic OSS costs on a strict usage basis rather than through a flat monthly fee." The effect of this condition will be to "eliminate any flat-rate, up-front charge for the right to use the company's standard electronic interfaces for accessing OSS (*i.e.*, flat-rate monthly charges for access to SBC's remote Access facility and Information Services Call Center, amounting to approximately $3,600 per month)." *Id.* at ¶ 384.

Further, "as a means of reducing the barriers to new entry in its region," SBC must "provide special OSS assistance to any 'qualifying' competitive LEC [less than $300m in total annual revenues]. Specifically, the merged firm will designate and make available for 36 months at no additional cost a team of OSS experts to assist these qualifying carriers with OSS issues." *Id.* at ¶ 385.

In response to concern from competing carriers that collocation costs have presented a formidable obstacle to entering the local service markets, SBC was required to "file a tariff or offer to amend interconnection agreements in each SBC/Ameritech state to demonstrate compliance with the Commission's collocation rules" before the date of the

merger. *Id.* at ¶ 386. Upon completion of the merger, the conditions provided for an independent auditor to present an audit report to the FCC. If the report revealed problems with SBC's collocation practices, the FCC could "decide to take additional action as deemed necessary and appropriate" to assure compliance.

The "most-favored nation" condition requires SBC to "facilitate market entry throughout SBC/Ameritech's region . . ." *Id.* at ¶ 388, First, SBC is required to offer competing telecommunications carriers "operating within its service area any interconnection arrangement or UNE ["unbundled network elements"] that SBC/Ameritech . . . secures." Second, "where it is feasible given technical limitations, SBC/Ameritech will make available to any requesting telecommunications carrier in any of its 13 states any Interconnection arrangement or UNE in any other of the same 13 states that was negotiated by an affiliate of SBC, subject to state-specific pricing." *Id.*

Further, "in addition to promoting market entry and assisting telecommunications carriers that want to operate in more than one SBC/Ameritech state, the conditions require SBC to offer to requesting telecommunications carriers an interconnection and/or resale agreement covering multiple SBC and/or Ameritech states . . ." *Id.* at ¶ 389. The FCC noted that this condition fosters competition because "negotiating a separate interconnection agreement between the same parties in multiple states can impose substantial unnecessary costs and delays on competitors and provides incumbent LECs (SBC/Ameritech) to game the process." *Id.*

Appendix B

The local market conditions also include a series of "carrier-to-carrier promotions." These conditions require SBC to: offer promotional discounts on the monthly charges for unbundled loops used in providing residential local service; offer a promotional resale discount on SBC/ Ameritech's retail telecommunications services, where the services are, in turn, resold to residential customers; and "offer end-to-end combinations of all network elements required to be unbundled as of January 24, 1999 to competitive LECs providing residential local service . . ." *Id.* at ¶¶ 391-393.

To ensure open local markets, SBC must also "continue to make available to telecommunications carriers each UNE that was available under SBC's and Ameritech's interconnection agreements as of January 24, 1999, even after the expiration of existing interconnection agreements . . ." The conditions also provide for alternative dispute resolution as a means of expediting "carrier-to-carrier disputes." *Id.* at ¶ 395. The FCC's order noted that "this process supplements, rather than supercedes, any other options at the carrier's disposal for addressing disputes with SBC or Ameritech . . ." *Id.* However, no state or CLEC (community local exchange carrier) is required to take part in the process.

Another condition to ensure open local markets requires SBC to provide shared transport to competitors "utilizing an advanced intelligent network software solution in each Ameritech state." *Id.* at ¶ 396. Shared transport refers to cable that connects facilities owned by different parties.

Further, SBC, "in order to provide information regarding possible options for additional competition in the provision of local service to multi-unit properties . . . will conduct a trial in five cities that will provide telecommunications carriers with access at a single point of interconnection to cabling owned or controlled by SBC-Ameritech" in multi-tenant residences and business properties. *Id.* at ¶ 397. Additionally, the conditions require SBC to "design and install all new cabling owned or controlled by SBC/Ameritech in a manner so that it can be accessed by any telecommunications carrier at a single point of interconnection . . ."

iii) Fostering Out-Of-Territory Competition

SBC must also, within thirty months of the merger closing date, "enter at least 30 major markets outside SBC's and Ameritech's incumbent service area as a facilities-based provider of local telecommunications services to business and residential customers." The FCC ruled that this condition will ensure that residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC. This condition effectively requires SBC and Ameritech to redeem their promise that their merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier. We also anticipate that this condition will stimulate competitive entry into the SBC/Ameritech region by the affected incumbent LECs." *Id.* at ¶ 398. Thus, SBC is required to enter into outside markets in an effort to spur competition among carriers nationwide. SBC must pay $110,000 per day for each missed "entry

requirement." *Id.* at ¶ 399. Therefore, "SBC would . . . be obligated to pay $39.6 million if it missed all 36 entry requirements in a market, or nearly $ 1.2 billion for missing the entry requirement in all 30 markets." *Id.*

iv) Improving Residential Phone Service

The FCC order states that "as a direct benefit to consumers, particularly low-income consumers and low-volume long distance callers . . . SBC/Ameritech will not charge residential customers a minimum monthly or minimum flat rate charge for long distance service for a period of not less than three years. This requirement should not only benefit those customers that make few long distance calls, but also should help to ensure that long distance services continue to be available to all consumers at competitive prices." *Id.* at ¶ 400.

In another condition "designed specifically to ensure that the benefits of the merger extend to low-income residential customers throughout all of SBC's and Ameritech's regions . . . [SBC must] offer each of its 13 in-region states a plan to provide discounts on basic local service for eligible customers . . . Specifically, SBC/Ameritech will offer to provide a discount equal to the price of basic residential measured rate service, excluding local usage, in each state, up to a maximum discount of $10.20 per month . . ." *Id.* at ¶ 401.

Further, "to promote affirmative service quality improvement," SBC must make quarterly reports about the quality of service that it provides to customers. *Id.* at ¶ 403. The FCC's order states that "by receiving such information

on a quarterly basis, the Commission and others can take appropriate action in the event such reports show service quality degradation." *Id.* at ¶ 404.

v) Ensuring Compliance with and Enforcement of the Conditions

Stating that "attaching conditions to a merger without an efficient and judicious enforcement program would impair the Commission's ability to protect the public interest," the FCC established compliance mechanisms to ensure that the merger conditions are being satisfied.

The FCC's order calls for the implementation of a compliance program "to identify all applicable compliance requirements, establish and maintain the internal controls needed to ensure compliance, evaluate the merged firm's compliance on an on-going basis, and take any corrective actions necessary to ensure full and timely compliance." *Id.* at ¶ 408.

While the FCC order states that it wants SBC to be self-policing over its compliance with the merger conditions, it also stated that "the Commission plans to conduct target audits of various aspects of the Applicants' compliance programs. Only a strong corporate compliance program in conjunction with the independent audit and other enforcement mechanisms, will enable consumers to realize the full benefit of the conditions." *Id.* at ¶ 409. These measures include retaining an independent auditor to conduct an annual audit and a final report. *Id.* at ¶ 410. The FCC's order states that "the independent audit requirement

establishes an efficient and cost-effective mechanism for providing reasonable assurances of SBC/Ameritech's compliance with its obligations under the conditions." *Id.* at ¶ 412.

As to the compliance measures, the FCC stated that "we expect that this heavy burden of persuasion, coupled with the compliance mechanisms and significant financial exposure, will ensure that the public enjoys the full benefits of these conditions in a timely manner." *Id.* at ¶ 414. The FCC also noted that "the enforcement and compliance programs established in these conditions in no way supercede or replace the Commission's enforcement and investigative powers, but merely supplement our usual process. The Commission may, at its discretion and subject to its normal procedures, take additional enforcement action against SBC/Ameritech for failing to comply with any provision of this Order . . ." *Id.* at ¶ 415.

The conditions set forth in the FCC's order expire within thirty-six months after the merger is complete. *Id.* at ¶ 416.

c. FCC's Conclusion

The FCC's order concluded that with the conditions adopted, "the merger of SBC and Ameritech is likely to be beneficial for consumers and spur competition in the local and advanced services markets. Given that the conditions will subsequently mitigate the potential public interest harms of the proposed merger and will result in affirmative public benefit, we conclude that [SBC] has demonstrated that the proposed merger, on balance, will serve the public interest,

convenience and necessity." *Id.* at ¶ 419. Thus, the FCC, in its review, concluded that, with the imposition of the aforementioned conditions, the SBC/Ameritech merger would be beneficial to consumers.

2. The Ohio Public Utilities Commission Review of the Merger

On April 8, 1999, the Ohio PUC issued an opinion and order which approved the SBC/Ameritech merger after a period of negotiations, discovery, and public commentary by several community organizations, associations, corporations, and the city of Toledo. The Ohio PUC also imposed some requirements before approving the merger, some of which are nearly identical to the FCC's list of conditions.

a. Ohio PUC Scope of Review

The Ohio PUC reviewed the SBC/Ameritech merger to determine whether it would "promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge." *In the Matter of the Joint Application of SBC Communications Inc., SBC Delaware, Inc., Ameritech Corp., and Ameritech Ohio for Consent and Approval of a Change of Control*, Case No. 98-1082-TP-AMT (Ohio Pub. Util. Comm'n April 8, 1999).

Appendix B

b. Conditions Imposed by the Ohio PUC.

i) OSS Conditions

SBC/Ameritech agreed to enter into certain stipulations and conditions required for the Ohio PUC's approval. The first class of conditions concern OSS. Within this set of conditions, SBC agreed with the Ohio PUC: to establish collaboratives to implement access to OSS in Ohio, especially to benefit new, smaller carriers; provide assistance, at no cost, to small carriers in Ohio for training and assistance for a period of four years following the merger. *Id.* at 14-16.

ii) Service Quality

Second, acknowledging the concern of the Ohio PUC about the potential for service quality to slacken, SBC has agreed to meet or exceed a service quality test, provide quarterly reports, and "conduct a series of studies as to the causes of non-telephone households in its service territory." *Id.* at 14-15.

iii) "Carrier-to-Carrier" Activities

A third set of conditions regard "carrier-to-carrier" activities. These conditions include an alternative dispute resolution process available to competing carriers. The Ohio PUC acknowledged that the process will not always create binding results, but it will be effective to "enable parties to focus more on reaching quick resolutions to problems, as opposed to pursuing litigation. That is a public benefit." *Id.* at 17.

The "carrier-to-carrier" conditions also provide for three promotions that SBC must offer to competing carriers: 1) UNE-loops "not purchased as a part of an Ameritech Ohio local switching combination;" 2) promotions for services resold to new carriers for their residential customers; 3) collocation promotions that require SBC to: install collocation requests within 90 days of the request, refund the pre-paid amount if the installation is not performed within 120 days, meet certain technical requirements, and reduce the prepaid rates; and lowered charges and payment options for access and service. *Id.* at 17-22.

iv) "Market Power"

The "market power" conditions require SBC to provide the Ohio PUC "with an assessment of competition and market power for a period of seven years . . ." *Id.* at 22. Further, "in the event that Ameritech Ohio does not demonstrate that it lost 200,000 residential access lines within four years of closing the merger. It will pay $15 million to its end users and [new carriers], $2.5 million to [Ohio's] education fund, and $2.5 million to [Ohio's] technology fund." *Id.* The Ohio PUC stated that these measures will mitigate SBC's market power and promote competition among the carriers.

v) The "Infrastructure" and "In-State" Conditions.

The "infrastructure" stipulation requires SBC to "invest at least $1.32 billion in Ameritech Ohio's local service infrastructure and network over the three years following the year in which the merger closes." *Id.* at 25.

Further, the "in-state presence" condition requires SBC to "maintain a state headquarters in Ohio for at least five years after the merger closing, maintain the number of full-time equivalent employees for two years, improve its customer-interfacing employees expertise, and regularly report the numbers of customer-interfacing employees for two years." *Id.* at 26. The Ohio PUC stated that the terms of this condition would be sufficient to provide adequate service to customers and competitors. *Id.* at 27.

vi) The "Books and Records" Condition

Under the "books and records" condition, SBC must provide its books and records to "any affiliate that engages in transactions with any SBC/Ameritech affiliate that operates in Ohio as a public utility." *Id.* at 29. The Ohio PUC held that this condition will allow them to ensure compliance with the terms of the merger. *Id.*

c. The Ohio PUC Conclusion

The Ohio PUC concluded that "the merger, under the terms of the [conditions] will promote the state's telecommunications policy, competition, diversity, and customer choice." *Id.* at 35, 40. It stated that the conditions imposed upon the merger resulted from "serious bargaining among capable, knowledgeable parties." *Id.* at 40.

3. The Illinois Commerce Commission's Review of the Merger

On September 23, 1999, the ICC issued an order approving the merger. The ICC's opinion followed evidentiary hearings held in January 1999, and interventions filed by corporations, associations, community organizations, the Illinois Attorney General, Cook County, the City of Chicago, and the ICC Staff. Several of the intervenors filed both initial and reply briefs. *SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, Illinois Bell Telephone Company d/b/a Ameritech Illinois and Ameritech Illinois Metro, Inc.*, 98-0555 (Illinois Commerce Comm'n September 23, 1999).

a. ICC Scope of Review

In its order, the ICC stated it "shall not approve the proposed reorganization of a public utility if it finds that the reorganization will adversely affect the utility's — in this case, [SBC's] — ability to perform its duties under the [Public Utilities Act]." *Id.* at 7.

b. The ICC's Conditions On Approval of the Merger

The ICC's order states that "the record . . . reveals that conditions to our approval need to be imposed in order to protect the interests of the Company and its customers."

Several of the conditions the ICC imposed are similar to those imposed by the Ohio PUC: SBC must maintain headquarters in-state for at least five years; infrastructure

modernization; OSS reports; OSS services and access to CLECs; state agency access to books and records; and enforcement and compliance measures with monetary damages as a consequence for non-compliance. SBC also agreed with the ICC to several other conditions to foster and promote competition and consumer protection.

i) "Interconnection Agreements"

SBC must meet several "interconnection commitments." Interconnection condition "A" requires: SBC to provide to Illinois CLECs services, facilities, or interconnection agreements/arrangements offered by SBC ILEC ["incumbent local exchange carriers"] affiliates in their in-region states subject to certain conditions. The ICC held that the condition is "valuable to CLECs and the expansion of the competitive market in Illinois . . ." *Id.* at 246-47. This condition also requires SBC to make optional payment plans available to CLECs for non-recurring charges. *Id.* at 247.

Interconnection condition "B" requires SBC to "convene a workshop or collaborative process with Staff and CLECs to discuss the UNEs, services, facilities or interconnection agreements." *Id.* at 248.

Interconnection condition "C" requires that SBC "shall provide . . . information regarding all interconnection agreements from other states to the [ICC] . . ." *Id.* at 249. The ICC explained that "this condition will make information available that may be useful to the [ICC] . . . during the collaborative process . . . to monitor [SBC's] continued compliance with the condition of offering agreements from other states in Illinois." *Id.* at 249-250.

Interconnection condition "D" provides that "if a CLEC affiliate of [SBC] obtains a UNE or interconnection arrangement from an [ILEC] through negotiation of that arrangement or through arbitration initiated by the [SBC] CLEC under 47 U.S.C. § 252, then [SBC] shall make available to requesting CLECs in Illinois, through good-faith negotiation, the same UNE or interconnection arrangement of the same terms (exclusive of price)." *Id.* at 250.

ii) "Shared Transport" Conditions

The ICC imposed a series of "shared transport" conditions. The conditions required SBC to provide shared transport to CLECs, first on an interim basis, then — within one year of the merger — the conditions require SBC to have a long-term solution. *Id.* at 250-253.

c. The ICC's Conclusion

The ICC's order concluded that "with the adoption of the conditions set forth herein, the proposed reorganization will not adversely affect the ability of [SBC] to perform its duties under the Illinois Public Utilities Act." *Id.* at 261.

C. Do Plaintiffs Show a Threat of Antitrust Injury arising out of the SBC/Ameritech Merger to Warrant Standing under 15 U.S.C. § 26?

Plaintiffs argue that they have successfully pled a threat of antitrust injury as a result of the SBC merger. First, they claim that their complaint pleads a threatened loss by "the recombination [of] the RBOCs and their exercise of

monopoly power." Plaintiffs argue that the merger: will create the nation's largest local phone company; expands SBC's service area to cover two-thirds of the U.S. population; puts SBC first among U.S. telecommunications companies in terms of access lines; makes SBC the largest non-European telecommunications company in Europe; re-combines three of the seven regional bell operating companies ("RBOCs") which frustrates the purpose of breaking up the AT&T telephone industry monopoly over twenty-five years ago; provides SBC monopoly power within the new geographic area; provides SBC with 31% of the telephone access line market in the United States.

Second, plaintiffs argue that it pled a threat of an antitrust injury by the barriers to CLECs entering into the market leading to a lack of competition to [SBC]. The corresponding allegations in their complaint state that "while [CLECs] are growing, they still only controlled less than 1% of local telephone lines." Further, plaintiffs assert in their complaint that the FCC's order did not accurately depict the CLECs market strength.

Third, plaintiffs argue that they have pled a threatened antitrust injury by alleging that the merger creates a highly-concentrated marketplace, "indicating an antitrust violation . . ." Plaintiffs specifically allege, that according to the HHI ("Herfindahl-Hirschman Index"), the merger drastically increases market concentration for local telephone services.

Finally, plaintiffs, in their response, argue that their complaint alleges a threat of antitrust injury through less actual and potential competition. Plaintiffs allege that the

merger eliminates what it calls a "substantial present likelihood" that SBC and Ameritech were going to be competitors. Therefore, the merger unravels whatever potential competition may have occurred between the two companies. Plaintiffs object that the FCC did not impose, as a condition of the merger, a requirement that other RBOC's enter SBC/Ameritech's service area.

SBC responds that plaintiffs have raised only speculative arguments and do not demonstrate a threat of an antitrust injury resulting from the merger. SBC contends that plaintiffs' allegations ignore the analysis of the three regulatory agencies which have thoroughly reviewed the merger and set conditions upon it that seek to foster the growth of competition and protect consumers. Specifically, referring to the FCC's review, SBC notes that the conditions the agency imposed "applied the public interest standard not only to prevent harms covered by the Clayton Act but also to facilitate the development and enhancement of competition within and outside the local service areas served by the merging companies."

Plaintiffs do not account for the conditions placed on the merger by the reviewing regulatory agencies and attempts to argue that an antitrust threat exists as though the conditions SBC entered into were not a factor in this court's determination of plaintiffs' claims. This court, does, however, rely on the agencies' decisions in its determination of whether plaintiffs have standing to bring this suit under 15 U.S.C. § 26. *See, SACCC I*, 191 F.3d at 845.

Appendix B

Plaintiffs' complaint is only an invitation for the court to marvel at the size of the SBC/Ameritech merger and conclude that it must automatically present a threatened antitrust injury sufficient to confer standing to them under the Clayton Act. Put another way, plaintiffs argue that they have standing by simply alluding to the proportions of the merger, and leaving it to the court to infer a threat of an antitrust violation simply because the merger is now a fact. Doing so would signal an automatic vote of no confidence to the three regulatory agencies, whose thorough examination of the merger crafted a solution that did more than ensure that competition did not suffer as a result, but saw to it that competition thrived.

It is not the court's holding that because this merger was reviewed by the three agencies, the court automatically defers to their conclusions. However, in light of their determinations, coupled with the fact that plaintiffs only allege merely speculative and vague claims that the SBC/Ameritech merger threatens an antitrust injury, the court concludes that plaintiffs have not made a showing for standing under section 16 of the Clayton Act.

CONCLUSION

For the foregoing reasons, defendant SBC's motion to dismiss Plaintiffs' complaint is GRANTED. IT IS SO ORDERED.

s/ Blanche M. Manning
Blanche M. Manning, U.S.D.J.

Dated: 6/22/01

Appendix B

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Minute Order Form (06/97)

Name of Assigned Judge or Magistrate Judge:
Blanche M. Manning

Case Number:
99 c 7232

Date:
June 22, 2001

Case Title:
South Austin Coalition Community Council v. SBC Communications, Inc.

* * *

Docket Entry:

* * *

(10) ■ [Other docket entry] For the reasons stated in the attached memorandum and order, defendant SBC's motion to dismiss [11-1] plaintiffs' complaint is GRANTED for lack of standing. IT IS SO ORDERED.

* * *

Appendix B

✓ Notices mailed by judge's staff.

* * *

Courtroom deputy's initials:
RTS

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED FEBRUARY 4, 2002

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 4, 2002

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

Hon. TERENCE T. EVANS, Circuit Judge

No. 00-3864

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, *et al.*,

Plaintiffs-Appellants,

v.

SBC COMMUNICATIONS INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois, Eastern Division.

No. 99 C 7232
Blanche M. Manning
Judge.

Appendix C

ORDER

Plaintiffs-appellants filed a petition for rehearing and rehearing en banc on January 2, 2002. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Chief Judge Flaum and Judge Williams did not participate in the consideration of the petition for rehearing en banc.

APPENDIX D — RELEVANT STATUTE

15 U.S.C.A. § 18

§ 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and

not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier

where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

APPENDIX E — EXCERPTS FROM MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION ADOPTED OCTOBER 6, 1999 AND RELEASED OCTOBER 8, 1999

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 98-141

In re Applications of

AMERITECH CORP.,

Transferor,

AND

SBC COMMUNICATION INC.,

Transferee,

For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1999 **Released: October 8, 1999**

* * *

77. We find that, with respect to the mass market for local exchange and exchange access services, SBC and Ameritech have the capabilities and incentives to make each firm a most significant market participant in particular markets in each other's regions. First, as described in Appendix B, prior to the announcement of the proposed merger, SBC and Ameritech had plans to enter other incumbent LECs' regions, including each other's. Second, as incumbent LECs, SBC and Ameritech have certain advantages when expanding out-of-region that other potential local service market entrants lack.

78. *Ameritech's Out-of-Region Plans.* We find that Ameritech is not only a most significant market participant in SBC's territory but also, as described in Appendix B, had both the incentives and capabilities to become a significant market participant in the St. Louis mass market for local exchange and exchange access service. The fact that Ameritech, prior to merger negotiations, had not begun offering commercial local wireline services out-of-region to the general public does not establish that Ameritech lacked the capabilities and incentives to expand. As described in greater detail in Appendix B, we find that, but for the merger, Ameritech would have implemented Project Gateway and entered the St. Louis residential market. In project Gateway, Ameritech's cellular company in St. Louis planned to offer local service as part of a bundle first to residential, and then to small business customers.[159] Applicants concede that uncertainties created by the planned merger were among the

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159. *See* Appendix B (Summary of Confidential Information and Conclusions).

reasons for placing Project Gateway on hold.[160] In addition, in testimony before the Illinois Commerce Commission, Ameritech admitted that it would have proceeded with the launch of Project Gateway had it not been for the merger.[161] Specifically, Ameritech's internal documents show that the firm had already announced its intention to enter SBC's St. Louis market, and was actively implementing those entry plans at the time the merger was announced.[162] Once the proposed merger was announced, Ameritech suddenly abandoned these plans.[163]

79. Ameritech offers conceivable reasons for canceling Project Gateway besides the merger, but many or all of them had existed for a long time without causing it to be cancelled,[164] Also, whatever the merits of these reasons, none

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160. *See* SBC/Ameritech July 24 Application, Description of the Transaction at 71-72.

161. *See* Appendix B (Summary of Confidential Information and Conclusions).

162. *See id.*

163. *See* SBC/Ameritech July 24 Application, Description of the Transaction.

164. Among other reasons for canceling Project Gateway, Ameritech argues that projections indicated financial losses due in part to the increased competition in the St. Louis market for mobile services. This justification nevertheless is tied to the merger, as Ameritech states that the significance of these financial losses was to diminish the attractiveness of its cellular assets in St. Louis to

(Cont'd)

of them is described in contemporaneous documents as *the* reason, or even *a* reason, for the cancellation. Indeed, there is no stated reason for the cancellation and no statement of a simultaneous event provoking cancellation in the documents Ameritech has provided to us. What did, in fact, occur simultaneously with the cancellation of Project Gateway was the agreement of Ameritech and SBC to merge. We conclude that Project Gateway was cancelled because SBC and Ameritech preferred to merge rather than compete in the mass market for local exchange and exchange access services in St. Louis and perhaps elsewhere.[165]

* * *

81. We disagree with Ameritech that its entry into St. Louis would have had a limited impact on that market. We find that absent the merger, it is highly likely that Ameritech ultimately would have made Project Gateway facilities-

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(Cont'd)

potential buyers of those assets given the "substantial probability" that the assets would need to be divested to satisfy antitrust and regulatory authorities. Ameritech also points to implementation problems (billing, pricing, and order processing) and notes that fixing them would have taken significant resources. Finally, Ameritech notes that, contrary to predictions, its new mobile competitors did not enter with a bundled service offering. Ameritech argues that this removed the need for a defensive offering such as Project Gateway. *See* Appendix B (Summary of Confidential Information and Conclusions), *See also* SBC/Ameritech July 24 Application, Description of Transaction at 71-72.

165. *See* Appendix B (Summary of Confidential Information and Conclusions).

based.[168] Although Ameritech initially relied on resale, this is typical of initial entry moves by competitive LECs. A competitive LEC's entry by resale may be a necessary first step to facilities-based competition. It is not *per se* a disavowal of it. In fact, Ameritech's documents indicate that it was considering facilities-based competition when it achieve sufficient scale to justify the related expenditure in capital,[169] and that it began several steps that, if completed, would have made it a facilities-based competitor in St. Louis.[170] Furthermore, we find that Ameritech's assertion that it lacks brand name recognition in St. Louis has no credibility. Ameritech had been aggressively promoting and providing its cellular service in St. Louis, under the Ameritech brand name, for many years. Ameritech's own documents show that it believed it had a strong brand name in St. Louis and that its brand name would enable it to compete effectively in the local service market there.[171] Finally, it is significant to our analysis that SBC considered Ameritech to be a potential facilities-based provider of local service to the Missouri consumer market[172] with strong brand name recognition.[173]

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168. *See id.*

169. *See id.* Ameritech documents indicate that it considered facilities-based entry for several out-of-region endeavors.

170. *See* Appendix B (Summary of Confidential Information and Conclusions).

171. *See id. See also* Sprint Oct. 15 Petition at 16-17.

172. *See* Appendix B (Summary of Confidential Information and Conclusions).

173. *See id.*

Therefore, we conclude that Ameritech is a significant market participant in the mass market for local exchange access services in St. Louis.[174]

82. *SBC's Out-of-Region Plans.* The evidence indicates that SBC is a potential entrant for mass market local exchange and exchange access service in Ameritech's region.[175] The evidence in the record indicates that SBC had plans to enter the mass market in Chicago, building off its cellular base in that city, and could thus be viewed as a potential entrant into this market.[176] Support for this argument comes

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174. *See id. See also* Sprint Oct. 15 Petition, Decl. of John B. Hayes at 28-31; Focal Oct. 15 Comments at 14; CPI Nov. 16 Reply Comment at 7; Consumer Federation of America/Consumers Union (CU/CFA) Nov. 16 Reply Comments at 3; Report of Gregory L. Rosston & Matthew G. Mercurio, An Economic Analysis of the SBC-Ameritech Merger at 15 (April 26, 1999), attach. to Attorneys General of Indiana, Michigan, Missouri, and Wisconsin Apr. 27 *Ex Parte* (filed April 27, 1999) (State Attorneys General Apr. 27 *Ex Parte*, Rosston & Mercurio Report).

175. *See* Appendix B (Summary of Confidential Information and Conclusions).

176. Baldwin and Golding argue SBC's Rochester experience (discussed in para. 78, *infra*) is not a good predictor of success in Chicago. The Consumer Coalition Oct. 15 Comments, Aff. of Susan M. Baldwin and Helen E. Golding at 38. Chicago, unlike Rochester, has many corporate headquarters whose telecommunications managers are familiar with SBC. Rosston & Mercurio argue that SBC is a potential entrant into Chicago since it has unique expertise, experience, operating systems, unique value, adjacency, brand name and facilities. *See* State Attorneys General Apr. 27 *Ex Parte*, Rosston & Mercurio Report at 19-20. *See also* CU/CFA Nov. 16 Reply Comments.

from SBC's own statements. For instance, in October 1996, SBC's James S. Kahan testified in the California SBC/PacTel merger proceeding that SBC had certain entry advantages in the Chicago market and therefore it "would make sense to enter the local exchange market in Chicago but not in Los Angeles." Kahan stated:

> In Chicago, we have an extensive wireless network consisting of 10 switches and over 600 cell sites. That network also includes extensive backbone network of microwave, leased facilities, and connections to a SONET ring. This network is supported by a sophisticated billing system, a responsive care unit, as well as sales and distribution marketing, accounting, finance, installation and maintenance and other personnel who reside in and understand the Chicago market. In addition, we have a well recognized brand name since we operate under the Cellular One name in Chicago. We also have a large existing customer base to which we send bills every month and to whom we could market services.[177]

83. We conclude that SBC was a significant potential entrant into Ameritech's region; SBC disagrees. SBC argues that Rochester, New York, was a first experiment in out-of-region competition in local services, and that the experiment failed, ending out-of-region planning. Nevertheless, we base

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177. Rebuttal Testimony of James S. Kahan (SBC), In the Matter of the Joint Application of Pacific Telesis Group and SBC Communications for SBC to Control Pacific Bell, Cal PUC Docket No. 96-05-038 (Cal. PUC Oct. 15 1996).

our conclusion in part on our analysis of the ability of SBC to pursue out-of-region opportunities using, in this instance, its out-of-region cellular assets. In addition, although it had no existing plans to enter out-of-region territories at the time of the merger, SBC's internal documents indicate the company contemplated such entry when the competitive landscape became clear, as discussed in Appendix B.[178] Therefore, we conclude that SBC had the incentives to make it a significant potential market participant in the mass market for local service in out-of-region markets such as Chicago. Significantly, Ameritech also perceived SBC's potential entry into Chicago as a competitive threat to Ameritech.[179]

* * * *

178. *See* Appendix B (Summary of Confidential Information and Conclusions).

179. *See* Appendix B (Summary of Confidential Information and Conclusions) citing State Attorney's General Apr. 27 *Ex Parte*, Rosston & Mercurio Report at 19.

Supreme Court, U.S.
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No. 01-1652

In the Supreme Court of the United States

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, WALTER E. RYAN JR., THEODORE CHABRAJA, ANITA B. HULL, ROBERT RIFKIN, and PATRICK A. STEFFES,

Petitioners,

v.

SBC COMMUNICATIONS INC. and AMERITECH CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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37 pg

QUESTION PRESENTED

Whether petitioners' antitrust challenge to the merger of SBC and Ameritech was properly dismissed based on the express exemption in Section 7 of the Clayton Act for line extension mergers between common carriers that do not substantially compete.

RULE 29.6 STATEMENT

SBC Communications Inc. has no parent corporation, and no publicly held company owns more than 10% of its stock. Ameritech Corporation is wholly owned by SBC Communications Inc.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek to rescind the merger of SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech") pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18. The SBC-Ameritech merger was reviewed by the Antitrust Division of the Department of Justice ("DOJ") and approved after lengthy proceedings by the Federal Communications Commission ("FCC") and two state regulatory commissions. The court below affirmed dismissal of petitioners' complaint, holding it barred by an express exemption in Section 7 for mergers that extend the lines of a common carrier where "there is no substantial competition" between the firms at the time of the merger.

The Section 7 exemption provides:

> Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from * * * extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

15 U.S.C. § 18. The decision below was compelled by that statutory language. It is uncontested that through the merger SBC extended its lines into what previously was Ameritech's territory, that there was "no substantial competition" between SBC and Ameritech at the time of the merger, and that both were common carriers subject to federal laws regulating

commerce. Petitioners have offered no valid reason why this express exemption does not bar their suit.

There is no conflict in the courts concerning the application of the Section 7 common carrier exemption to phone company mergers, which petitioners concede is an issue of first impression. Pet. 3. In fact, there is only one prior decision addressing the exemption at all, and it was issued by the same court of appeals and reached the same conclusion. See *Navajo Terminals, Inc.* v. *United States*, 620 F.2d 594 (7th Cir. 1979) (upholding merger of trucking companies).

Nor does the Seventh Circuit's ruling raise exceptional practical problems warranting intervention by this Court. Line extension mergers between noncompeting common carriers generate antitrust disputes only rarely. That explains the paucity of case law addressing the 90-year old common carrier exemption.

The proposed merger in this case underwent a government review process—by the DOJ, the FCC, and two state commissions—of unprecedented thoroughness. The agencies added numerous merger conditions and requirements addressing the complex competitive issues that characterize today's rapidly changing telecommunications marketplace. Those conditions require affirmative assistance to new market entrants, establish elaborate reporting and auditing procedures, are backed by tough sanctions, and ensure continuous monitoring by the FCC and state regulators.

The DOJ concluded that the merger, once overlapping cellular assets were spun off, did not threaten competition. The FCC ruled that the merger as conditioned would

affirmatively promote competition both in the Ameritech region and nationwide. The state commissions agreed that the merger as conditioned would jump-start competition. As for petitioners' theory that the merger prevented potential competition by SBC in Chicago, the FCC found that prior to the merger SBC had "no existing plans" to provide local telephone service in the Chicago market.

Furthermore, several alternative grounds for dismissing petitioners' complaint make this case a poor vehicle for addressing the court of appeals' application of Section 7's common carrier exemption. Petitioners' Section 7 claim relied on an "actual potential competition" theory that this Court has never adopted. Even if that theory were valid, the complaint did not allege its elements. Moreover, petitioners' complaint was an impermissible collateral attack on the FCC's approval of the SBC-Ameritech merger. Petitioners actively participated in the FCC merger proceeding and then failed to appeal the FCC's approval of the merger and its determination that the merger would affirmatively promote competition.

STATEMENT OF THE CASE

SBC and Ameritech announced their plans to merge in May 1998. At that time, SBC provided local telephone service to customers in the Southwest (Arkansas, Kansas, Missouri, Oklahoma, and Texas), the Far West (California and Nevada), and Connecticut, and Ameritech did the same for customers in the Upper Midwest (Illinois, Indiana, Michigan, Ohio, and Wisconsin).

Agency Approvals. The proposed merger was exhaustively reviewed by the Antitrust Division of the DOJ, the FCC, the Illinois Commerce Commission ("ICC"), and

the Ohio Public Utilities Commission ("PUCO"), each of which analyzed the competitive impact of the merger.

The DOJ, exercising its authority under the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, declined to challenge the merger once the parties agreed to divest overlapping cellular operations in St. Louis and parts of Illinois. The DOJ explained that "there is no reason under the antitrust laws to proceed with further litigation if the divestitures of the cellular system assets are carried out in the manner required by the proposed Final Judgment." *United States* v. *SBC Communications Inc.*, 1999 WL 1211458, at *27 (D.D.C. Aug. 2, 1999). The district court approved a consent decree terminating the DOJ's investigation and dismissing its complaint. *Id.* at *11. No appeal was taken from that decision. Ameritech subsequently divested its overlapping cellular assets.

The FCC then reviewed the merger under the statutory public interest test. *Ameritech Corp.*, FCC 99-279, ¶¶ 39-45, 1999 WL 1337659 (Oct. 8, 1999) ("FCC Order"). The FCC's public interest test employs a more stringent standard than the Clayton Act. Unlike an antitrust court, which considers only whether acquisitions "substantially lessen competition" (15 U.S.C. § 18), the FCC will not approve a merger unless "it will enhance competition." FCC Order ¶¶ 49-50. The FCC proceedings lasted 14 months, involved participation by some 60 parties (including antitrust enforcement officials, telephone industry regulators, economists, and public interest advocates), and produced a voluminous record. See FCC Order ¶¶ 39-45.

The FCC imposed unprecedented and far-reaching conditions on the merging parties in a 244-page order and

213-page appendix. The FCC found that, after the merger, "competition in the provision of local exchange services, including advanced services, will increase both inside and outside the merged firm's region" (FCC Order ¶ 4); the conditions will "reduc[e] the risk and costs associated with entry into SBC and Ameritech territories, particularly with respect to residential and advanced services markets, [and] stimulate entry into these markets" (*id.* ¶ 422); and the conditions "will prove beneficial in jumpstarting residential competition by lowering entry barriers for residential competition [and will] greatly reduce the costs of entry over the long run" (*id.* ¶ 440). The FCC ultimately concluded, based on the "voluminous record," that with these conditions the SBC-Ameritech merger would promote competition and satisfy the public interest test. *Id.* ¶¶ 4, 581.

Petitioners actively participated in the FCC proceedings, offering the very same arguments they made in the courts below and demanding precisely the same relief (an order invalidating the merger). See Public Comment on behalf of South Austin Community Coalition Council, Walter Ryan Jr., Theodore Chabraja, Anita B. Hull and Robert Rifkin (received October 19, 1998) (C.A. Supp. App. Tab 1). Petitioners did not seek rehearing of the FCC's ruling (authorized by 47 U.S.C. § 405(a)), nor did they seek judicial review in a federal court of appeals (authorized by *id.* § 402(b)).[1]

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[1] An appeal of the FCC Order was filed by the Association of Communications Enterprises. It involved only a narrow issue concerning the merged company's provision through a subsidiary of certain advanced telecommunications services for resale. See *Association of Communications Enters.* v. *FCC*, 235 F.3d 662 (D.C.

The state commissions also approved the merger after extensive public hearings and imposed additional pro-competitive conditions of their own, designed to assist local exchange rivals through deep discounts and guaranteed access to Ameritech's network. See *SBC Communications Inc.*, No. 98-0555, at 108-09, 1999 WL 1331303 (ICC Sept. 23, 1999) ("ICC Order") ("the proposed merger is not likely to have a significant adverse affect on competition"; the merger conditions "represent substantial pro-competitive benefits for CLECs and end-users in Illinois"); *SBC Communications Inc.*, No. 98-1082-TP-AMT, at 40, 1999 WL 397741, at *28 (PUCO April 8, 1999) ("PUCO Order") (the merger, as conditioned, "will promote the state's telecommunications policy, competition, diversity, and customer choice").

The merger closed in October 1999. As a result, SBC's network of customers in the Southwest, Far West, and Connecticut expanded to include approximately 20 million additional customers in the Upper Midwest. The FCC and state public utility commissions continue to regulate the post-merger telephone services of SBC throughout its 13-state region.

Petitioners' Claims. Petitioners' complaint was filed on behalf of a class of all local phone service customers of SBC and Ameritech in the area served by the merged company. Cmplt. ¶¶ 3-9. Petitioners alleged a violation of Section 7 of the Clayton Act on the theory that the merger would "lessen potential competition in the relevant markets." *Id.* p. 2.

Cir. 2001), on remand, *Ameritech Corp.*, FCC 01-82, 2001 WL 830658 (Mar. 7, 2001).

The Complaint acknowledged that SBC and Ameritech were not actual competitors at the time of the merger. Cmplt. ¶¶ 10-11. Instead, the merger allegedly put an end to potential competition between the two firms in the Chicago and St. Louis markets. *Id.* ¶¶ 36, 59. The Complaint did not allege, however, when such potential competition might have occurred. And it did not mention the FCC's conclusion that SBC "had no existing plans to enter out-of-region territories at the time of the merger" (FCC Order ¶ 83) or the ICC's conclusion that there was no "reasonable probability" that SBC would provide local telephone service in Illinois "in the next two years" (ICC Order at 104). The Complaint also did not allege that any lost potential competition would have brought greater competitive benefits to consumers than were achieved through the merger conditions imposed by the DOJ, the FCC, and the state commissions.

Petitioners requested injunctive relief, specifically "divestiture of a substantial number of markets to competitors" or "an injunction unwinding the merger." Cmplt. p. 20.

Decisions Below. Explaining that petitioners' "speculative and vague claims" failed to plead an antitrust violation, the district court dismissed their complaint for lack of standing. Pet. App. 39a. The court of appeals, in a unanimous opinion authored by Judge Easterbrook and joined by Judges Kanne and Evans, affirmed on an alternative ground. Specifically, the court found controlling the fourth paragraph of Section 7 of the Clayton Act, which exempts line extension mergers of regulated common carriers from Section 7 when "there is no substantial competition" between the carriers. Pet. App. 5a-6a.

After noting that "SBC and Ameritech were common carriers" and that telecommunications carriers like SBC and Ameritech "are subject to many laws regulating commerce," the court of appeals observed that the enactment history of the common carrier exemption, which was amended specifically to include telephone and other non-rail common carriers, confirms that the exemption applies to telephone carrier mergers. Pet. App. 6a-7a. In response to petitioners' argument that the new era of telecommunications competition calls for a different reading of the exemption's scope, the court explained: "Even if competition among common carriers were a novelty, however, this would not affect the meaning of § 7. The world may have changed, but the statute has not. * * * [A] change in economic conditions is a challenge to *Congress*, not the courts; and if the legislature leaves exemptions alone, they must be enforced as written." Pet. App. 8a.

The court then considered whether petitioners' allegation that SBC and Ameritech were potential competitors made them substantial competitors. The court rejected that assertion, reasoning that, if potential competition were substantial competition, there would be "no work for the exemption to do" in light of Section 7's general ban on combinations that "may . . . substantially . . . lessen competition." Pet. App. 9a. As the court put it, "[t]he only function of this exemption must be to distinguish potential-competition from actual-competition cases." *Ibid.* Judge Easterbrook added that this conclusion is entirely reasonable, since "[a]ssessing the significance of potential competition is difficult for the best economists and would be nearly impossible as a subject for trial—especially when regulatory

agencies exercise so much control over how common carriers interact." *Ibid.*

Accordingly, the court unanimously held that the common carrier exemption plainly barred petitioners' Section 7 challenge to the SBC-Ameritech merger. Petitioners' request for rehearing en banc was denied without dissent. Pet. App. 42a-43a.

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit's Unanimous Decision Does Not Conflict With Any Decision Of This Court Or Any Other Court.

As petitioners concede, the present case is one of first impression. Pet. 3. No court has previously considered the applicability of the common carrier exemption to a telephone company merger. In fact, in the nine decades since the exemption's enactment, only one case—a Seventh Circuit decision involving a merger of motor carriers, *Navajo Terminals, Inc.* v. *United States*, 620 F.2d 594 (7th Cir. 1979)—has addressed the applicability of the exemption in *any* context. And the decision below is entirely consistent with that lone precedent.

In *Navajo Terminals*, the Seventh Circuit vacated an Interstate Commerce Commission ruling that a trucking firm's acquisition of a 26 percent interest in another trucking firm violated Section 7. The court ruled that, although the two firms operated over four common routes, the carriers each served a large territory not served by the other, so that combining the two merely extended the acquiring company's lines "even though the resulting common control can substantially lessen competition in some specific markets

where both are doing business." 620 F.2d at 600-601. This is an even stronger case for application of the common carrier exemption than *Navajo Terminals* because SBC and Ameritech did not compete *at all* in the provision of local telephone service at the time of the merger.

Petitioners' attempt to manufacture a conflict with this Court's opinion in *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), and with Justice Scalia's concurring opinion in *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989), is frivolous. Neither of those opinions makes any mention of the common carrier exemption in Section 7.

Royal Drug, which petitioners cite for the proposition that "general laws like the Clayton Act" must be read broadly and "special interest exemptions" must be read narrowly (Pet. 12), was a price-fixing and group boycott case arising under the Sherman Act. This Court held only that the McCarran-Ferguson Act's antitrust exemption for the "business of insurance" does not exempt insurers' non-insurance transactions, such as price-fixing conspiracies with pharmacies. 440 U.S. at 231-233. *Royal Drug* supports the approach taken by the Seventh Circuit in this case. It reaffirms that antitrust exemptions must be evaluated in light of the "language of the statute" and its "legislative history" (*id.* at 210-211)—precisely what the Seventh Circuit evaluated here. *Royal Drug* certainly does not require or authorize courts to ignore the plain meaning of statutory antitrust exemptions and construe them more narrowly than Congress intended. See *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 781 (1993) (construing the McCarran-Ferguson Act's "business of insurance" exemption "[b]y its terms"); *National Gerimedical Hosp. & Gerontology Ctr.* v.

Blue Cross, 452 U.S. 378, 389 (1981) ("where Congress did intend to repeal the antitrust laws, that intent governs"); *United States* v. *Hutcheson*, 312 U.S. 219, 235 (1941) (antitrust exemptions "must not be read in a spirit of mutilating narrowness").

Petitioners' citation of Justice Scalia's concurring opinion in *Bock Laundry* is even farther afield. Pet. 12, 16-17. *Bock Laundry* addressed a rule of evidence, not any provision of the antitrust laws. Justice Scalia referred to interpretive rules that come into play only if the plain meaning of a statute is ambiguous or absurd. 490 U.S. at 527-529. Nothing in Justice Scalia's opinion conflicts with the decision below or the Seventh Circuit's interpretive approach. The common carrier exemption is not ambiguous, and its plain meaning does not produce absurdity. See Part II, *infra*.

Section 7's narrow common carrier exemption has been applied only twice since the passage of the Clayton Act in 1914 and only once in the context of telephone company mergers. An exemption applied so infrequently poses no threat to effective antitrust enforcement, as petitioners falsely contend. Pet. 11. The Seventh Circuit's decision in no way hinders the government's ability to address potential competition concerns arising out of mergers in the telecommunications field. The DOJ reviews all mergers in this field under the Hart-Scott-Rodino Act and is free to file complaints that raise either horizontal or vertical competition issues (as it did here). The common carrier exemption allows the FCC a full opportunity to review such mergers for potential competition concerns, with continued input from the Justice Department and an opportunity for all affected parties to seek judicial review. The demanding competition standard applied by the FCC—precluding approval unless the

merger "will enhance competition" (FCC Order ¶¶ 49-50)—is considerably more exacting than the Section 7 standard applied by antitrust courts.

Expert federal and state regulators charged with protecting consumers, including the DOJ's Antitrust Division, the FCC, and state regulatory commissions, sustained this merger after carefully reviewing its impact on local telephone service markets and imposing a host of conditions designed to affirmatively stimulate competition and protect consumers. Those agencies have been equally vigilant in sanctioning SBC/Ameritech when it has not performed to expectations, as the newspaper articles cited by petitioners demonstrate.[2]

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[2] More up-to-date materials confirm that complaints about SBC-Ameritech's service have been addressed by regulators and that local competition is increasing as expected. See *AT&T Launches New Local Service*, Chi. Trib., Jun. 6, 2002, sec. 3, at 1 (noting that AT&T has joined WorldCom-MCI, Z-Tel Technologies, and AT&T Broadband as local phone service providers in the Chicago area "seeking to steal customers from SBC Ameritech"); *The State of Phone Competition*, Chi. Trib., May 18, 2002, sec. 1, at 26 (noting that "competition in Illinois has been steadily increasing"); *Ameritech May Have Fewer Workers*, Chi. Trib., Apr. 27, 2002, sec. 3, at 1 (noting "[i]ncreasing competition and improvements in service" in Illinois). The same is true in other SBC service areas. See *SBC Communications Inc.*, FCC 01-338, 2001 WL 1456806 (Nov. 16, 2001) (granting authority to offer InterLATA (long distance) service in Arkansas and Missouri based on SBC's satisfaction of FCC competitive checklist); *SBC Communications Inc.*, FCC 01-29, 2001 WL 55637 (Jan. 22, 2001) (same for Kansas and Oklahoma); *SBC Communications Inc.*, FCC 00-238, 2000 WL 870853 (June 30, 2000) (same for Texas).

II. The Decision Below Is A Straightforward Application Of The Common Carrier Exemption.

The common carrier exemption, by its plain language, immunizes the SBC-Ameritech merger from Section 7 challenge. It states that nothing in Section 7 shall prevent a "common carrier subject to the laws to regulate commerce * * * from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired." 15 U.S.C. § 18. As the Seventh Circuit concluded, the SBC-Ameritech merger indisputably satisfies each element of the exemption.

A. The merging companies were common carriers subject to laws regulating commerce.

At the time of the merger, "[b]oth SBC and Ameritech [we]re common carriers." FCC Order ¶ 53 & n.135. See also Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 539, 544-545 (1910) (adding "telegraph, telephone, and cable companies" to the list of "common carriers" subject to ICC regulation); *Howard* v. *Illinois Cent. R.R.*, 207 U.S. 463, 497 (1908) (holding that an operator of "telephone lines" is a "common carrier"). Both companies were subject to numerous federal laws regulating commerce, including the Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934), and the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("1996 Act").

In addition, as the Seventh Circuit's opinion explains (Pet. App. 7a), the enactment history of the common carrier exemption confirms that it applies to telephone company mergers. Congress enacted the exemption based on its

understanding that line-extension mergers of regulated carriers afford potential public benefits when they do not extinguish substantial existing competition. The original House bill limited the exemption to railroads, but the Conference Committee accepted the Senate's substitution of "common carrier" for "railroad." H.R. Conf. Rep. No. 63-1168, at 13 (1914), in 3 E. Kintner, LEG. HIST. FED. ANTITRUST LAWS AND RELATED STATUTES, Part 1, at 2466 (1978). The Senate Report stated that the provision as amended would "apply to any common carrier, thus including *telephone* and pipe lines, the committee believing that all common carriers should be given the same rights in this respect and that the extension of the rights to *telephone* and pipe lines would inure to the benefit of the public." S. Rep. No. 63-698, at 47 (1914), in 2 E. Kintner, *supra*, at 1748 (1978) (emphases added). Plainly, then, SBC and Ameritech were "common carrier[s] subject to the laws to regulate commerce."

Petitioners speculate that neither the 1914 Congress that enacted the common carrier exemption nor the 1996 Congress that overhauled the telecommunications laws would have understood SBC and Ameritech to be regulated common carriers. Even if speculation about what Congress would have understood could override the plain statutory text, petitioners' argument is pure fiction.

There is no evidence in the legislative record that Congress in 1914 intended the common carrier exemption to apply only to carriers regulated in a particular manner, as petitioners contend (Pet. 12-14). And the evolution of telecommunications regulation over the last 90 years only serves to confirm the legislative rationale that led to passage of the exemption. Prior to 1914, federal common carrier

regulation was limited and state regulation sporadic (at least with respect to telephone service). R. Vietor, *AT&T and the Public Good: Regulation and Competition in Telecommunications, 1910-1987*, in FUTURE COMPETITION IN TELECOMMUNICATIONS 27, 32-40 (S. Bradley & J. Hausman eds., 1989) (describing the rise of federal regulation); W. Lavey, *The Public Policies That Changed The Telephone Industry Into Regulated Monopolies: Lessons From Around 1915*, 39 FED. COMM. L.J. 171, 184-190 (1987) (describing the rise of state regulation); see generally *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1654-1655 & n.3 (2002) (describing the early history of utility regulation).

Telephone carriers today are subject to federal and state regulation greatly surpassing that in existence in 1914. See P. Huber et al., FEDERAL TELECOMMUNICATIONS LAW §§ 3.11-3.12 (2d ed. 1999) (describing federal obligations); H. Brands & E. Leo, THE LAW AND REGULATION OF TELECOMMUNICATIONS CARRIERS 7-8 (1999) (describing state obligations). The 1996 Act added a host of new requirements that "impos[e] various obligations on incumbent local-exchange carriers," such as SBC and Ameritech. *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 122 S. Ct. 1753, 1756 (2002). Most relevant for present purposes, current regulation applies competitive standards to mergers that exceed Section 7 criteria, while affording affirmative assistance to new market entrants. See *supra*, p. 4; *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). Thus, rather than suggesting that the common carrier exception is somehow "obsolete," this enhancement of regulatory supervision provides compelling practical support for construing the common carrier exemption in accordance with its literal terms.

Petitioners would like this Court to judicially repeal the common carrier exemption on the ground that regulatory oversight has changed since 1914. But that is plainly an impermissible mode of statutory interpretation. "[A] statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.' Considerations of this kind are for the Congress, not the courts." *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 827 (1978) (citation omitted).

Petitioners also argue that Congress *impliedly* repealed the common carrier exemption by passing the 1996 Act (Pet. 15-16). They rely on the fact that in 1996 Congress amended Section 7 of the Clayton Act (and Section 221(a) of the Communications Act) to remove the FCC's previous general authority to immunize telecommunications mergers from all antitrust challenge. Pub. L. 104-104 § 601(b)(2)-(3), 110 Stat. at 143. But that amendment refutes petitioners' position. If Congress wanted to preclude application of the common carrier exemption to Bell company mergers, its 1996 amendment of Section 7 gave it the perfect opportunity to do so. The fact that Congress left the common carrier exemption in place shows that it continues to apply to line extension mergers of common carriers such as SBC and Ameritech that did not substantially compete at the time of the merger.

The Seventh Circuit properly rejected petitioners' argument for an implied repeal of the common carrier exemption. Repeals by implication are disfavored. *Traynor* v. *Turnage*, 485 U.S. 535, 547 (1988); *TVA* v. *Hill*, 437 U.S. 153, 189 (1978). The fact that the 1996 Act expressly states that it may not be construed to "modify, impair or supersede the applicability of any of the antitrust laws" (Pub. L. 104-

104 § 601(b)(1), 110 Stat. at 143) underscores Congress's intent to leave the common carrier exemption undisturbed.

B. SBC extended its lines through the medium of acquisition of stock and there was no competition between the merging parties.

The SBC-Ameritech merger extended SBC's "lines through the medium of acquisition of stock or otherwise" (15 U.S.C. § 18), a fact not contested by petitioners in the court below. SBC acquired Ameritech, a contiguous telephone carrier, in a transaction that enlarged SBC's local exchange network. The merger combined SBC's local network in the southwestern United States with Ameritech's local network in the Upper Midwest. See, *e.g.*, *Texas & P. Ry. Co.* v. *Gulf Ry. Co.*, 270 U.S. 266, 276-279 (1926) (Brandeis, J.) (stating traditional rule that line extension occurs when a carrier acquires facilities in a "new territory"); *Mackay Radio & Tel. Co.*, 6 F.C.C. 562, 570-577 (1938) (summarizing this Court's decisions) (a transaction creating an "extended line" occurs "when a carrier acquires by lease or otherwise the facilities of another carrier in order to extend its * * * service to an area not theretofore served by it").

Petitioners also did not dispute that neither SBC nor Ameritech provided local service in the other's region at the time of the merger. See *supra*, p. 7; ICC Order at 98 ("SBC and Ameritech do not currently compete in the relevant market"); FCC Order ¶ 65 (same). Petitioners' own complaint alleges that both SBC and Ameritech had "monopolies" in their respective local markets. Cmplt. ¶ 36. Thus, there cannot have been "substantial competition" between the merging companies.

Petitioners do argue, of course, that there was "potential" competition between SBC and Ameritech prior to the merger. Pet. 14-15. But the fact that Congress worded the common carrier exemption in the *present tense*, so that it applies "where there *is* no substantial competition," confirms that only *actual*, rather than *potential*, competition is relevant. See P. Huber et al., FEDERAL TELECOMMUNICATIONS LAW, *supra*, § 7.4.1.1 at 613 ("only actual (not potential) competition matters, and only *substantial* actual competition at that"). As the Seventh Circuit explained, "[t]he only function of [the common carrier exemption] must be to distinguish potential-competition from actual-competition cases." Pet. App. 9a. Otherwise the exemption would apply only to mergers that have little or no effect on competition (whether actual or potential) and thus could not violate Section 7 in the first place. *Ibid.* Petitioners do not even try to counter the Seventh Circuit's reasoning with any explanation of how their theory comports with the statutory text.

C. The Seventh Circuit's construction of Section 7 does not produce absurd results.

Petitioners complain that the Seventh Circuit's interpretation of the common carrier exemption will lead to absurd results, including reconsolidation of the former Bell operating companies. Pet. 17. This is idle speculation based on the hypothesis that further mergers among the former Bell operating companies would be approved by the FCC and state public utility commissions, whose authority to review, condition, and block telephone company mergers is unaffected by the Seventh Circuit's ruling. It is also possible, given the rapid growth of competition throughout the telecommunications industry fostered by the 1996 Act and

the SBC-Ameritech merger conditions imposed by the FCC and challenged by petitioners in this case, that such mergers will not fit within the category of protected line-extension mergers between regulated common carriers that do not substantially compete. This case simply does not provide an appropriate vehicle for predicting what other courts will do or be called upon to do in factually different situations that may (or may not) present themselves in future years.

Moreover, as the Seventh Circuit noted (Pet. App. 9a), having expert administrative agencies, rather than judges and juries, evaluate "potential competition" claims among regulated common carriers is a reasonable legislative choice. Assessing the significance of "potential competition" is no easy task, especially in a highly regulated industry. See R. Posner, ANTITRUST LAW 144 (2d ed. 2001) ("there is no practical method of ranking by likelihood or imminence of entry the potential competitors in a market in order to identify a set of most likely or most feared entrants. * * * And even if a set of most-likely entrants could be identified by the methods of litigation, the court would not know how to determine the significance of the elimination of one member of the set"). As commentators have explained, any detriment from a loss of potential competition is difficult to determine because "the loss of potential competition may be more than offset by the contribution of a merger to actual competition." 5 P. Areeda & D. Turner, ANTITRUST LAW ¶ 1116, at 69 (1980). The record in this case demonstrates that the expert agencies are well equipped to offset theoretical losses of potential competition by imposing requirements that stimulate *actual* competition in multiple service areas.

III. Petitioners' Complaint Is Defective For Other Reasons That Make This Case An Inappropriate Vehicle For Further Review.

This is not an appropriate vehicle for resolution of the issues raised in the petition because the complaint fails to state a valid cause of action.

A. The complaint fails to state a Section 7 claim.

Petitioners' complaint alleges a Section 7 violation based on the "actual potential competition" theory. See Cmplt. ¶¶ 58-61. By identifying SBC and Ameritech as monopolists in their respective regions, the complaint rules out an "actual competition" theory. See Cmplt. ¶ 36. And by omitting any allegations that SBC's potential entry constrained Ameritech's conduct, the complaint contains no support for a "perceived potential competition" theory. See *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 531-537 (1973); H. Hovenkamp, FEDERAL ANTITRUST POLICY 559-561 (2d ed. 1999). Petitioners are left only with their "actual potential competition" theory, which condemns a merger if the acquiring company, but for the merger, would have entered the market on its own and thereby made the market more competitive. See *United States* v. *Marine Bancorp.*, 418 U.S. 602, 625 (1974); Hovenkamp, FEDERAL ANTITRUST POLICY, *supra*, at 562-563.

This Court has never accepted the actual potential competition theory. See *Marine Bancorp.*, 418 U.S. at 639 (declining opportunity to adopt theory); *Falstaff Brewing*, 410 U.S. at 537 (same). And the courts of appeals have expressed great skepticism about the theory, noting its "novelty," its position at the "frontiers" of antitrust law, and the "understandable doubt" about its validity. *FTC* v.

Atlantic Richfield Co., 549 F.2d 289, 294 (4th Cir. 1977); *Mercantile Tex. Corp.* v. *Board of Governors*, 638 F.2d 1255, 1265 (5th Cir. 1981); *United States* v. *Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980). No court has ever granted relief to a private litigant under the theory.

This lack of support for the actual potential competition theory reflects its legal and practical defects. It does not fit with Section 7's textual limitation to mergers that "substantially lessen competition." 15 U.S.C. § 18. And it requires a largely speculative assessment of whether and when the acquiring firm would have entered the market independently, raising difficult questions of proof. See *Marine Bancorp.*, 418 U.S. at 624 ("Unequivocal proof that an acquiring firm actually would have entered de novo but for a merger is rarely available"); *Siemens Corp.*, 621 F.2d at 504 (the theory "rests on speculation about the future conduct and competitive impact of a firm currently outside the market and perhaps intending to remain so"). For these and other reasons, antitrust scholars have been highly critical of the actual potential competition theory. See Hovenkamp, FEDERAL ANTITRUST POLICY, *supra*, at 562-563 (criticizing the theory because of the difficult proof problems its raises and suggesting that it be relegated to "the scrap heap of defunct merger theories"); R. Posner, ANTITRUST LAW, *supra*, at 145 (recommending that the entire potential competition doctrine be abandoned).

Even if the actual potential competition theory could support a Section 7 claim, petitioners' complaint failed to allege the required elements. The complaint alleged that the SBC-Ameritech merger preempted plans by Ameritech to offer local phone service in St. Louis and by SBC to offer local phone service in Chicago. Cmplt. ¶¶ 59-60, 64. But

petitioners all reside in the Ameritech region (Cmplt. ¶¶ 3-8) and therefore would not have standing to challenge any loss of potential competition in St. Louis. See *Southwest Suburban Bd. of Realtors, Inc.* v. *Beverly Area Planning Ass'n*, 830 F.2d 1374, 1379 (7th Cir. 1987) (plaintiff did not have standing to bring antitrust claim where it was not a "participant in [the relevant] market"). As for SBC's potential entry into the Chicago market, the Complaint did not allege that, but for the merger, SBC would have offered local telephone service in Chicago in the near future; that AT&T, MCI-WorldCom, and Sprint were not viable entrants; or that SBC's entry was necessary to deconcentrate the Chicago market. Such allegations are preconditions to any claim based on the actual potential competition theory. *Marine Bancorp.*, 418 U.S. at 630, 633; *Tenneco, Inc.* v. *FTC*, 689 F.2d 346, 352 (2d Cir. 1982).

Petitioners' speculation about vague "plans" on the part of SBC is insufficient to state a claim. Cmplt. ¶ 59; see *Marine Bancorp.*, 418 U.S. at 622-623 (Section 7 "deals in probabilities, not ephemeral possibilities"). Allegations about a potential entrant's "plans" for entering a market must relate "to the near future" and not merely speculate about "eventual entry." *BOC Int'l Ltd.* v. *FTC*, 557 F.2d 24, 29 (2d Cir. 1977); see also *Tenneco*, 689 F.2d at 352 (rejecting an actual potential competition claim based on a failure to show that the acquiring company would have entered the relevant market "in the near future"). Moreover, petitioners have not alleged that the FCC erred in finding that SBC "had *no existing plans* to enter out-of-region territories at the time of the merger." FCC Order ¶ 83 (emphasis added).

Nor did petitioners' complaint allege that SBC's entry was needed to deconcentrate the Chicago market. A

potential competition claim must allege not only that there are "few other equivalent potential entrants," but also that entry barriers stand in the way of competition by others. 1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 355 (5th ed. 2002) (citing cases). Otherwise, the loss of a particular potential competitor will have little effect on the likelihood of independent future entry. Petitioners' failure to allege the lack of other viable entrants into the Chicago market is not surprising, given the ICC's findings that "more than a few potential entrants are equivalent to SBC" (including AT&T, MCI-Worldcom, Sprint, BellSouth, Verizon, and Qwest) and that "more than 20 local exchange carriers" then provided competitive service in Ameritech Illinois' service territory. ICC Order at 97, 103. The complaint's failure to specify any entry barriers is also unsurprising, given the "host of special duties" that the 1996 Act imposes on incumbent local exchange carriers, *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390, 399-400 (7th Cir. 2000), the numerous pro-competitive merger conditions imposed by state and federal regulators, and the effect of rapidly proliferating technology on market entry. All these omissions were fatal to petitioners' actual potential competition claim.

B. Petitioners impermissibly seek to relitigate the findings of the FCC.

There is an additional fatal defect in petitioners' antitrust complaint. It amounts to an impermissible collateral attack on the FCC's approval of the SBC-Ameritech merger. Petitioners fully participated in the FCC's proceedings, where they made the same arguments that they raised in this case, but failed to take an available appeal when their arguments were rejected.

As this Court explained in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 306 (1973), regulatory proceedings subject to judicial review "obviate any necessity for the antitrust court to relitigate the issues actually disposed of by the agency decision." Both the majority and dissenting opinions in *Ricci* agreed that "when a court stays its hand to allow agency proceedings," as it did here (see *South Austin Coalition Community Council* v. *SBC Communications Inc.*, 191 F.3d 842 (7th Cir. 1999)), "the result of those proceedings may not be collaterally attacked when the case returns to the court." 409 U.S. at 306; *id.* at 312 (Marshall, J., dissenting); accord *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72 (1970) (unanimously concluding that it would be "inappropriate" to allow the plaintiff to "force collateral redetermination of the same issue" by the district court).

This is a far stronger case than *Ricci* for rejecting an attempt to relitigate issues actually resolved by the agency. The plaintiff there lacked any right to participate in the agency proceeding at issue (409 U.S. at 312), whereas the petitioners here actively participated in the FCC proceeding. Petitioners' lengthy brief in the FCC proceeding, filed by the same counsel who represents them here, contained allegations virtually identical to those made in this case—that the merger would violate the Clayton Act by causing a loss of potential competition—and sought the very same relief. See *supra*, p. 5; *Pan Am. World Airways, Inc.* v. *United States*, 371 U.S. 296, 313 & n.19 (1963) (antitrust suit "should have been dismissed" where the "remedy in this civil antitrust suit" was "available" from the agency). The FCC expressly considered petitioners' arguments, citing them in its Order (nn.149 & 1115), and rejected them, ruling instead

that the merger would affirmatively promote competition to the benefit of consumers. FCC Order ¶¶ 4, 581.

Petitioners could have appealed the FCC's decision pursuant to 47 U.S.C. § 402(b) but elected not to do so. Instead, they demand an opportunity to relitigate the very issues already addressed and actually disposed of by the FCC. Petitioners' collateral attack is directly foreclosed by *Ricci* and its progeny. See also *In re Wheat Rail Freight Rate Antitrust Litig.*, 759 F.2d 1305, 1314 (7th Cir. 1985) (where an antitrust plaintiff previously participated in regulatory proceedings, the agency approved the conduct challenged by the plaintiff, and the plaintiff failed to appeal but sought the same remedy from the antitrust court, permitting the antitrust suit to proceed in the district court "would be repugnant to the operation of the regulatory scheme"). Petitioners' failure to appeal has substantially prejudiced SBC and Ameritech, which have expended vast resources in reliance on the FCC's approval order and in compliance with the host of conditions imposed by the FCC and the state commissions.

In light of these fundamental defects in petitioners' antitrust case, it is clear that, even if this Court granted certiorari on the question presented, petitioners' complaint would still be subject to dismissal. There is no reason to waste substantial private and judicial resources in a fruitless endeavor.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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No. 01-1652

IN THE

Supreme Court of the United States

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, WALTER E. RYAN JR., THEODORE CHABRAJA, ANITA B. HULL, ROBERT RIFKIN, and PATRICK A. STEFFES,

Petitioners,

v.

SBC COMMUNICATIONS INC., and AMERITECH CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF

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Plaintiffs file this supplemental brief pursuant to Rule 15 to call attention to three new cases not available at the time Petitioners' filed their Petition for Certiorari. Sup. Ct. R. 15; *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238 (1985) (duty to inform the Court of "any" developments that may affect the outcome of the case). These new decisions demonstrate the timeliness of the question presented (the validity of antitrust claims following the enactment of the 1996 Telecommunications Act) now enhanced by a split developed among the circuits.

The Seventh Circuit's holding in this case that the line-extension doctrine as applied in *Navajo Terminals Inc. v. United States*, 620 F.2d 594 (7th Cir. 1979) should be extended into the area of telecommunications exempting antitrust enforcement is in contradiction to the regulatory milieu of deregulation with accompanying antitrust enforcement and represents a split between the circuits worthy of the Supreme Court's attention.

The recent decisions discussed below highlight a conflict of decisions rendered by United States Court of Appeals from the Second, Seventh, and Eleventh Circuits. The recent decisions issued by the Second Circuit Court of Appeals in *Law Offices of Curtis v. Trinko, L.L.P. v. Bell Atlantic Corp.*, 294 F.3d 307 (2d Cir. 2002) (June 20, 2002) and the Eleventh Circuit Court of Appeals in *Covad Communications Co. v. Bell South Corp.*, 299 F.3d 1272 (11th Cir. 2002) (August 2, 2002) along with *Verizon New Jersey, Inc. v. Ntgrity TeleContent Services, Inc.*, 2002 U.S. Dist. LEXIS 14741 (D. N.J. Aug. 12, 2002) are in conflict with the Seventh Circuit's decision in this case contradicting Congress' intention to subject telecommunication carriers to the full array of antitrust enforcement, specifically merging "baby Bells" or incumbent local exchange carriers.

Both Courts in *Trinko* and *Covad* acknowledge Congress enacted telecommunications deregulation to spur competition while ensuring consumer protection by private enforcement of the antitrust laws. Thus, the telecommunications industry was dramatically changed by the introduction of deregulation to promote competition in local markets after enactment of the Telecommunications Act of 1996. *Trinko*, 294 F.3d at 311. Congress, in spurring competition, explicitly *did not* provided immunity from antitrust violation claims for conduct covered in the 1996 Act. *Covad*, 299 F.3d at *14. The Eleventh Circuit held "Congress specifically and directly stated that the two Acts [Telecommunications Act of 1996 and the Sherman Act] were intended to be used in tandem to accomplish the congressional goals served by both acts — namely the stimulation of competition." *Covad*, 299 F.3d at *14.

The conflict between the Seventh Circuit's decision in this case and the decisions from the Second and Eleventh Circuit is whether incumbent local exchange carriers [ILECs] (SBC and Ameritech in this case) are "subject to antitrust enforcement." *See Covad*, 299 F.3d at *14. The Eleventh Circuit in *Covad* quoted the legislative record regarding the enactment of the Telecommunications Act:

> Antitrust law is synonymous with low prices and consumer protection — and that is exactly what we need in our telecommunications industry . . . *The bill contains an all-important antitrust savings clause which ensures that any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws* . . . And by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers.

Covad, 299 F.3d at * 17 -18; 142 Cong. Rec. H1145-06 (daily ed. Feb. 1, 1996 (statement of Rep. Conyers) (emphasis

added). The Eleventh Circuit concluded that "both the legislative and executive branches recognized that the antitrust laws would coexist alongside the [Telecommunications] Act." *Covad*, 299 F.3d at * 19.

The *Covad* case held that Plaintiff had stated claims under the antitrust laws. *Covad*, 299 F. 3d at *10, 13 & 14. Similarly, in *Trinko* the allegations of the complaint "may support an antitrust claim under a number of theories." *Trinko*, 294 F.3d at 326.

Trinko's holding is in even sharper conflict with the Seventh Circuit's decision. *Trinko* held:

> The savings clause unambiguously establishes that there is no 'plain repugnancy' between the Telecommunications Act and the antitrust statues. We thus find that the Telecommunications Act does not provide an 'implied immunity' from the antitrust laws. . . . [in a case] which involves an individual consumer seeking damages, the antitrust laws serve an important role. One of the purposes of the Clayton Act is 'to compensate victims of antitrust violations for their injuries.'

Trinko, 294 F.3d at 327-28; *citing*, *Illinois Brick Co. v. Illinois* 431 U.S. 720, 746 (1977).

Again the conflict among circuits is highlighted by *Trinko's* conclusion that, "While ideally, the regulatory process alone would be enough to bring competition to the local phone service markets, it is possible that the antitrust laws will be needed to supplement the regulatory scheme, especially with respect to injury caused to consumers." *Trinko*, 294 F.3d at 329.

Therefore, the exemption or loophole in antitrust enforcement created and expanded by the Seventh Circuit in this case is now not just an issue of utmost public importance because it contradicts Congress' antitrust enforcement intentions associated with deregulation, but also represents a conflict in decisions between circuits which would be well served by the Supreme Court's attention.

Respectfully submitted,

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No. 01-1652

In the Supreme Court of the United States

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, WALTER E. RYAN JR., THEODORE CHABRAJA, ANITA B. HULL, ROBERT RIFKIN, and PATRICK A. STEFFES,

Petitioners,

v.

SBC COMMUNICATIONS INC. and AMERITECH CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF

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The new authority petitioners cite in their Supplemental Brief has no relevance to the question presented in this case.

Petitioners seek certiorari to review the Seventh Circuit's dismissal of their Clayton Act § 7 challenge to the merger of SBC and Ameritech under an express exemption in § 7 for line extension mergers between common carriers that do not substantially compete. See 15 U.S.C. § 18. The cases petitioners bring to the Court's attention—*Law Offices of Curtis V. Trinko, L.L.P.* v. *Bell Atlantic Corp.*, 294 F.3d 307 (2d Cir. 2002), as amended, 2002 WL 31015490 (2d Cir. Aug. 30, 2002); *Covad Communications Co.* v. *BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002); and *Verizon New Jersey, Inc.* v. *Ntegrity Telecontent Services, Inc.*, 2002 WL 1835433 (D.N.J. Aug. 12, 2002)—do not contain one word concerning the Clayton Act § 7 exemption for common carrier line extension mergers. In fact, none of the cases involves either Clayton Act § 7 or a telephone company merger.

Rather, all three cases address whether telecommunications customers may assert Sherman Act § 2 monopolization claims (for denial of essential facilities, refusal to deal, price squeezes, monopoly leveraging, or similar actions) consistent with the extensive regulatory regime established by the Telecommunications Act of 1996. *Trinko*, 2002 WL 31015490, at *14-*19; *Covad*, 299 F.3d at 1279-1291; *Verizon New Jersey*, 2002 WL 1835433, at *7-*15.

The *Trinko* and *Covad* cases do hold that customers may bring such claims,[1] but they in no way suggest that the

[1] The *Verizon New Jersey* court reached the opposite conclusion because the customers in that case failed to state antitrust claims independent from their claims that the defendant phone company had not complied with its Telecommunications Act obligations. 2002 WL 1835433, at *13-*15; see also *Goldwasser v. Ameritech Corp.*,

Telecommunications Act impliedly repealed the Clayton Act § 7 exemption at issue here, as petitioners argue. Indeed the logic behind *Trinko* and *Covad*—that the Telecommunications Act does not affect the application of the antitrust laws—bolsters the case for applying the common carrier exemption according to its plain terms. Simply put, the cases petitioners cite do not conflict with the Seventh Circuit's ruling in this case.

Respectfully submitted.

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222 F.3d 390, 399-401 (7th Cir. 2000).